IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Proceedings Before the National Labor Relations Board:

5.18.61 Charges filed with the Board.
12.1.61 Order consolidating cases, consolidated complaint & notice of consolidated hearing dated
12.11.61 Amended order consolidating cases, amended consolidated complaint and notice of consolidated hearing dated
12.21.61 Answer to complaint received
1.9.62 Hearing opened
1.12.62 Hearing closed
1.22.62 Union's motion to reopen the hearing for purpose of receiving exhibit, dated
2.23.62 Trial Examiner's order receiving posthearing exhibit, dated
6.7.62 Trial Examiner A. Norman Somers' Intermediate Report and Recommended Order issued
9.4.62 Petitioners'[1] exceptions to the Intermediate Report received
9.4.62 Petitioners' request for oral argument received (No formal action taken)
9.5.62 General Counsel's exceptions to the Intermediate Report received
1.17.64 Decision and Order issued by the National Labor Board, dated
3.23.64 Petitioners' motion for reconsideration received
5.18.64 Board's order denying Petitioners' motion, dated

Proceedings in the Court of Appeals for the Seventh Circuit and the Supreme Court of the United States:

6.26.64 Petition for review filed
9.15.64 Petition of union to intervene filed
9.16.64 Order denying petition to intervene dated
11.12.64 Union petition for writ of certiorari relating to intervention issue filed in Supreme Court
1.18.65 Order granting petition for writ of certiorari dated
12.7.65 Decision of Supreme Court permitting union to intervene issued
10.26.67 Intervenor's motion for summary dismissal filed
11.8.67 Order denying intervenor's motion for summary dismissal, dated
1.17.68 Oral argument in Court of Appeals
3.5.68 Opinion and order of Court of Appeals filed
4.3.68 Board's proposed decree served upon parties
4.16.68 Decree of Court of Appeals entered
7.6.68 Petition for writ of certiorari docketed in Supreme Court
10.14.68 Order granting petition for writ of certiorari, issued

[1] Petitioners herein were Charging Parties before the Board.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

[1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

In the Matter of: LOCAL 283, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO (WISCONSIN MOTOR CORPORATION) and RUSSELL SCOFIELD, an individual LAWRENCE HANSEN, an individual EMIL STEFANEC, an individual GEORGE KOZBIEL, an individual	Case Nos. 13-CB-1059-1 13-CB-1059-2 13-CB-1059-3 13-CB-1059-4

YMCA New Central Branch
915 West Wisconsin Avenue
Milwaukee, Wisconsin
Tuesday, January 9, 1962

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p.m.

BEFORE:

A. Norman Somers, Esq., Trial Examiner.

APPEARANCES:

Benjamin K. Blackburn, Esq. and Lawrence F. Doppelt, Esq., 176 West Adams Street, Chicago, Illinois, appearing on behalf of the Counsel for the General Counsel.

Max Raskin, Esq. and Herbert S. Bratt, Esq., 606 West Wisconsin Avenue, Milwaukee, Wisconsin, appearing on behalf of Local 283, Respondent.

[1A] Lowell Goerlich, Esq., 1126-16th Street, N. W., Washington, D. C., appearing on behalf of Local 283, Respondent.

Karcher & Zahn by Edward J. Zahn, Jr., Esq., 438½ Pine Street, Burlington, Wisconsin, appearing on behalf of Russell Scofield et al., Complainants.

* * *

[30] PETER ZAGORSKI

was called as a witness by the General Counsel pursuant to Rule 43 (b) and, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination.

* * *

[46] Q. (By Mr. Blackburn) Mr. Zagorski, do you know how production ceilings came into existence at Wisconsin Motor Corporation? A. Yes.

Q. Did they come into existence in 1944? A. To this degree of making resolutions, making by-laws; but it was a gentleman agreement dating back to 1938 which today some of the members of the board are today holding highly respected positions in Wisconsin Motor Corporation personnel.

* * *

[52] Q. (By Mr. Blackburn) I think I can restate it. Let me try. When you came back from service in January, '46, what was the status of production ceilings of Wisconsin Motor? A. There was resolution made by the membership.

Q. Of the union? [53] A. Of the union stating that X number of dollars was considered a fair day's work to provide jobs for more people.

Trial Examiner: Is that dollars or hours?

The Witness: Dollars per hours.

* * *

[56] Q. (By Mr. Blackburn) Now, back to January, 1946, when you came back from service, Mr. Zagorski, was the union doing anything to enforce this motion? A. Yes.

Q. What was it doing at that time? A. We would sometimes once a year, twice a year, take a general check. By that I mean we would go to the Wisconsin Motor management and ask them for a duplicate copy of a given day of everybody's work cards.

Q. A day picked at random? A. That we picked, that the union picked at random.

Q. All right. A. The company then could give us a duplicate copy of all employees working that particular day.

Q. Did you tell the company what you wanted the cards for? A. Yes.

* * *

[58] Q. All right. Go ahead. I'm sorry I interrupted you. A. We would then give these cards to their respective stewards in their areas because they would know the machines, they would know the classification these machines were in and we posted around the plant including the timekeeper's office what was day rate, what was machine rate, and what was ceiling, and by virtue of the figures posted around, the stewards themselves would check against the machine, against the classification this machine was in and see if they were within the request of the union production ceiling.

Q. When you say we posted, you mean the union posted? A. The union, that's right. Those people that were over the ceiling were then called to a meeting and we would ask how this occurred.

Q. Now, you say called to a meeting. Is this a union meeting? A. No, it was by a trial committee.

Q. Of the union? A. Of the union. The trial committee consisted of executive board members. We'd have not more than five, not less than three present.

Q. Did company officials participate in these meetings of the trial committee? [59] A. No; but they knew it was going on.

Q. But they weren't there? A. No.

Q. How did they know it was going on? A. Because it was held in the cafeteria of the company.

Q. Now, what periods specifically are you talking about now? A. All the time to sometime I believe in '57 or '58 when the company told us we no longer, I was not president at that time; but I read the minutes and the company at that time took a position that they would not allow the union to hold these hearings on company property.

Q. Let me see if I understand you, Mr. Zagorski. You are testifying that from January '46 until sometime in 1956 or '57 the union trial committee regularly met in the company cafeteria to hold these trials, were they? A. Yes.

Q. And you say they met regularly during that period? A. I would say once or twice a year until such time as the people that were found guilty would have been heard and tried. Sometimes it took a day.

Q. Once or twice every year from '46 to '57? A. That's correct.

Q. In '46 where was the union's office located? A. It was opposite side of the employment office.

Q. In the plant? [60] A. In the Wisconsin Motor Corporation plant one.

* * *

[61] Q. Well, during the years that you had the—your office in the plant, didn't you have some of these trial hearings in your office? A. Yes.

Q. Did you hold them in the cafeteria, did you ever hold them in the cafeteria when you had an office in the plant? A. I would say yes.

Q. You recall that specifically? A. Yes, yes.

Q. Well, how often would you hold them in the cafeteria and how often would you hold them in the office? A. It all depends on how many people we had to appear.

Q. Well, how big was your office? A. Oh, gosh, about eight by eight, eight by seven, eight by eight.

Q. And you said the trial committee would consist of three to five members of the executive board? A. Yes.

Q. How would you conduct these trials; would you call the ceiling violator in one at a time? A. That is correct.

Q. So the maximum number of people you'd have at a hearing [62] would be five on the committee and one, six? A. Well, we had an understanding with the company we would not call down more than one. This way they would not lose so much production hours.

Q. But it would be six would be about the most people who would be present at one of these things? A. I would say four or five.

Q. The violator who was called before the trial committee, he didn't bring counsel with him or anything like that, did he? A. No, because we supplied him with his records that we received from the company.

Q. And the union didn't have a prosecutor or any official like that in there to present its case to this trial committee, did it? A. No.

Q. It's a trial committee and the workmen would come in and you'd have the meeting that way, if I understand it? A. That is correct.

Trial Examiner: You were talking about having the trials take place individually for each alleged violator of the ceiling restriction. In order not to take too many men away from their work. Did I understand that the trials were held on company time?

The Witness: That is correct.

Q. (By Mr. Blackburn) Once again, Mr. Zagorski, I have [63] interrupted you. You were telling me how this enforcement worked and we'd gotten to the point where you said you had these hearings and I think it's pretty clear now that the trial committee would call the violator in. Suppose your take it up from that point. What happened at these hearings? A. Well again I say we were careful so that we did not take too many people at one time and we also worked in the system of one department close to another so that these people wouldn't lose too much time leaving their jobs and coming down for this hearing. At one time we were told by Mr. Wurtz that we were losing, the people were losing too much time through this hearings and we'd have to leave and we'd have to hold

them elsewhere. Then we told Mr. Wurtz and the company that if they wanted key machines down longer than was necessary then we would do that and after a meeting on that basis we again were allowed to have these hearings back in the plant.

Q. Well, you have wandered a little afield from what I was trying to get into, Mr. Zagorski. I'll come back to this point in just a minute. What I want to clear up for the record at this point is what the union would do to ceiling violators when it called them in before this trial committee. A. We would show them the cards and ask them if this card was his, if it was accurate and what explanation he had for going over ceiling, ask him if he believed in it and ask him what reason he had for it. We would then would judge on the [64] merits of his answers and to see the amount. In many cases we'd see the fellow didn't have no violations for say many years prior to the time he was called. We would fine him $1.00 to $5.00 and we'd waive the fine in saying that because of his record being clean that we would not fine him at this time but if it occurred again the fine that we waived would be added to whatever fine was given to him on the second offense.

Q. You say the fine was $1.00 up to $5.00, do I understand you? A. Yes.

Q. You would pick the amount of the fine based on how serious the violation was or something like that, I presume; is that correct? A. (Witness nodding in the affirmative.)

Q. Now, in some cases I take it you didn't waive the fine, you did fine the man and collect the fine from him? A. That is correct.

* * *

[74] Mr. Blackburn: In an off-the-record discussion among counsel and the Trial Examiner, the following stipulation was arrived at: It is stipulated that a resolution was adopted by the membership of Local 283 in December, 1955, which was subsequently amended twice so that by December, 13, 1958, the [75] resolution read as it appears on General Counsel's Exhibit 13. Those two amendments

which took place between 1955 and 1958 changed Section 3, changed the wording of Section 3 from "persistent and flagrant violations" to "persistent and/or flagrant violations" and the other amendment changed the number of the article of the constitution referred to from some number other than 30 to Article 30 as it appears in General Counsel's Exhibit 13. In February, 1961, the what had been previously a resolution of the membership of Local 283 was adopted as a by-law of Local 283 and that by-law appears in General Counsel's Exhibit 14 which has previously been erroneously described in this record as a copy of the resolution as it existed in December—on December 3, 1955. The notation in ink on General Counsel's Exhibit 14; 12-3-55 has no significance.

* * *

[95] Q. (By Mr. Blackburn) Mr. Zagorski, I understand there was a strike at Wisconsin Motor by Local 283 in 1956; is that correct? A. That's correct.

* * *

[96] Q. What were the issues that brought about the strike, Mr. Zagorski? A. Oh, it was a waiver clause. It was time paid by the company for union activity time and the ceiling.

Q. And what position did the company take as to production ceilings prior to the strike? A. They wanted the ceiling raised.

Q. Didn't they ask that the ceilings be eliminated completely? A. Not to my recollection.

Q. And what was done about the ceilings when the strike was over? A. The company said that they would give us a lot of inequities if we would raise the ceiling ten cents.

Q. The company would give you a lot of— A. Inequities; monetary issues.

Q. What do you mean by that, sir? I don't understand you.

Mr. Raskin: Corrections of inequities.

[97] The Witness: Yes.

Q. (By Mr. Blackburn) What sort of inequities are you referring to? A. Day work was in various classifications. They got up to seventeen cents an hour, received two and a half per cent or six cents, whichever was the greater, received a better vacation and in all it was monetary issues like I say, involved money; but this was all based on providing we raised the ceiling ten cents.

* * *

[109] Mr. Blackburn: I think it would be helpful to have it in the record. Would you mark these General Counsel's Exhibit 24 for identification.

(The document above-referred to was marked. General Counsel's Exhibit No. 24 for identification.)

Q. (By Mr. Blackburn) Mr. Zagorski, I hand you a piece of [110] paper that's been marked General Counsel's Exhibit 24 for identification.

Mr. Blackburn: And I assume, Mr. Raskin, we can put this in by stipulation as being whatever Mr. Zagorski describes it as?

Mr. Raskin: Yes.

Mr. Blackburn: Fine.

Q. Can you tell us what that is, Mr. Zagorski? A. This is the five labor grades we have now in the Wisconsin Motor Corporation plant. Describes what the day rate is in each classification, the machine rate, ceiling per how, ceiling per eighthours.

* * *

[111] Q. (By Mr. Blackburn) Mr. Zagorski, how are the figures in the ceiling per hour column arrived at? A. Classification of job, price of job, through the course of many years in established agreement between all concerned.

Q. Taking grade one just as an example, who decided that the number under ceiling per hour for grade one would be $2.90? A. The company and the union.

Q. How? A. By contract negotiations.

Q. When? A. Through the course of years.

Q. Well, this particular figure, when was this one arrived at? [112] A. Just a total of all the commitments made through negotiations through the course of years.

Q. Do I understand you to mean that this figure has been increased from time to time? A. That is correct.

Q. In the course of the years and has eventually arrived at $2.90 where it now stands; is that correct? A. That is correct.

Q. How did you arrive at the figure ceiling for eight hours? Is that just multiplying the figure ceiling per hour by eight, I presume? A. That is correct.

* * *

[114] Q. (By Mr. Blackburn) Mr. Zagorski, substituting in Mr. Somer's question the three hours that he's specified, assume that the particular employee can earn $23.20, taking the grade one ceiling for eight hours figure, can earn that in seven hours. Just assume this for the moment. Is that employee then free to leave the plant at that time? [115] A. Of course not.

Q. Does he stop working at that time? A. Not necessarily.

Q. The material that he produces over the $23.20 that day, what happens to the parts that he turns out? A. They go just like any other part.

Q. What happens to the pay that he's entitled to for those parts? A. He then puts his money aside to take care of any trouble, down time which the company would have paid which they don't pay because he puts this time over and beyond to cover up the expense.

Q. You say he puts the money aside? A. That is correct, the money for the pieces he made.

Q. He puts the record of those pieces aside? A. As known company wise or in layman language, kitty, or a little bank.

Q. Bank is the one I am familiar with. Can we call it the bank? A. Yes, sir.

Q. He holds back the record of the fact that he's made those pieces that day and turns them in on his production some subsequent day, isn't that correct? A. That and also when his machine is broken down which normally the company would have to pay out of their own pockets for [116] the down time which is less than his average earnings which is the ceiling, he then puts in the pieces that he had in the bank and the company does not have to pay any money.

Q. Let's go back to our assumed worker and our assumed situation. On day one he has managed to produce $23.20 worth in seven hours and he turns in his production records for that day for that much work so that for that day he will be paid $23.20. For the last hour of his shift he then continues to produce pieces. These pieces are turned in to the company, it's part of their production for that day; but his record of the fact, his claim for the fact that he is entitled to be paid for those pieces he does not turn in that day; is that correct? A. If he was fortunate enough to make more, yes.

* * *

[117] Q. Let's get back to our specific example. Let's assume this man has only one hour's worth in the bank because we said that he worked the last hour of the day before and didn't turn in his records. So let's assume he had nothing before that day at the end of the first day he had one hour in the bank. The next day he has three hours of down time. Could he then or would he then on day number two report production for one of his three hours down time and be compensated for day rate or machine rate for the other two hours? A. Not necessarily. He could try and overcome the down time [118] providing he had a good enough job, a good enough rate the particular day when the down time occurred.

Q. He would work harder for the other five hours and maybe make up some of those three hours' time? A. That's right.

Q. Assume he worked like a beaver, he managed to make up two hours' production, could he or would he then go to day one for the other he had in the bank, take the

two hours that he had managed to make up in the five hours he worked on day two and show production at the ceiling level on day two for the whole eight hour shift? A. Providing there was the same job running the day prior to it he could if he wanted to.

Q. Does it work this way in practice at Wisconsin Motor? A. Accepted practices, yes.

* * *

[120] Trial Examiner: Maybe I don't understand this. If the employee worked at a rate, that it has produced a quantity which would entitle him on a piece work basis to more than the ceiling, so far as the employer is concerned, he can demand payment for the high production that he has achieved. He can ask the employer for payment and the employer will pay it to him. It may be a violation of your resolution; but between him and the employer, he can—or put it this way, if he should ask the employer to reimburse him or to compensate him in accordance with the piece rate standing, the employer will pay it to him.

The Witness: Yes.

Trial Examiner: I see. And this whole, this resolution which is now in the by-laws is an arrangement whereby for the reason that you have previously indicated, you want the employee not to do so.

The Witness: That's right.

Trial Examiner: And if he does so, it's a violation of that—

The Witness: Resolution.

Trial Examiner: —of the by-law.

* * *

[132] Trial Examiner: In other words, you didn't ask him to work more slowly on the machine.

The Witness: Never.

Trial Examiner: Just let him follow his own pace.

[133] The Witness: That's right.

Trial Examiner: And then if he should earn, if the quantity produced entitles him to more than the ceiling rate, he shouldn't do that, he shouldn't claim more than

the ceiling rate but let the excess go into the bank for the use that you described previously in answer to Mr. Blackburn's question.

The Witness: That's right.

Trial Examiner: Is that what you have in mind. And I am interested in how the employer enters into the picture. I would assume you need a certain amount of cooperation from the employer in order to be able to do that.

The Witness: Up to now we had no trouble.

Trial Examiner: When is now, up to February?

The Witness: Well, I say we have no trouble even to this point.

* * *

[167] ARNOLD OLSON

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Mr. Olson having been sworn will be seated. Give your full name and address to the reporter, please.

The Witness: Arnold Olson, 638 North 79th Street, Milwaukee, Wisconsin.

Direct Examination.

Q. (By Mr. Blackburn) What is your occupation, Mr. Olson? A. Director of industrial relations at Wisconsin Motor.

* * *

[172] Q. (By Mr. Blackburn) Were negotiations for a new contract held in 1959, Mr. Olson? A. No. Yes, there is a complete contract negotiation 1959.

Q. Did you participate in those negotiations as a representative of the company? A. Yes, I did.

Q. What did you say to the union in the course of the 1959 negotiations with respect to production ceilings if anything? A. During the 1959 contract negotiations we requested that the ceilings be increased ten cents.

* * *

[181] Q. (By Mr. Blackburn) Mr. Olson, did the union ever ask you to help you enforce production ceilings? A. No, they did not.

Q. Has the union ever accused you of violating any contracts by letting employees earn more than they can earn under the production ceilings? A. No, they have never done that.

Q. Was there any grievance meeting after February 14, 1961, at which Mr. Zagorski or any other union representative on or off [182] the record asked you to enforce production ceilings by stopping employees from earning more? A. No.

Q. Was there any such grievance meeting at which anything like this happened prior to February 14, 1961? A. No, sir.

Q. Mr. Olson, does the company let the union see production records upon request? A. Yes, they do.

* * *

[184] *Cross-Examination.*

* * *

[198] Q. Well, you knew that when the union representatives requested the cards, the time cards— A. That's right.

Q. —you knew, did you not, that this was for the purpose of checking any ceiling violations? A. I didn't know exactly what they were used for although I think that we had a pretty good idea that they may have been used for the checking of the ceilings.

Q. Yes. And you knew that at the time the request was made? A. I didn't know exactly what they were going to use them for; but I suspected that that might be one of the reasons.

Q. Well, this thing of ceiling isn't anything new with you, is it? A. No, it is not, no.

Q. In fact, it's been in there ever since you came with the company? A. Long before.

Q. So it isn't a subject that's foreign? A. No, it is not.

Q. You didn't have to suspect too much, did you? A. No.

* * *

[202] Mr. Raskin: I will withdraw the last question. I don't want to get into unnecessary discussion on that.

Q. It was agreed between the parties, was it not, Mr. Olson, that the ceiling need not be included in the printed contract? A. That was not agreed to. We would never permit the item of ceilings being placed into our contract because the company had never agreed to any restrictions on earnings as far as our employees are concerned.

Q. You had never done that at any time? A. We have never agreed that there should be any restrictions on earnings of our employees.

Q. Well, I'll ask you this question. You had never inserted in any document ceilings, the use of the word ceilings? A. There was reference made to ceilings in our 1956 strike settlement agreement; but there was never any mention made of ceilings in any of our union contracts from the time that I—

* * *

[203] Q. But you did permit it to go into the strike settlement contract? A. That's right, under pressure of a strike, and we were at that time well along in a strike that lasted three and a half months, and we were under terrific pressure and as far as we were concerned, we would have liked to have had complete elimination of ceilings or we'd like to have had a fifteen cent increase in ceilings, but we were only able to obtain a ten cent increase in ceilings, and that document that we signed in 1956 was a strike settlement agreement in which the union agreed to increase the ceilings ten cents; but there is no mention in there that we would not permit employees to earn more than ceilings.

* * *

[206] Q. (By Mr. Raskin) Before there was an agreement on the part of the union to increase the ceilings ten cents were there negotiations on the subject of ceiling generally? A. Yes, there were discussions.

Q. And did the company make some offer to induce the increase in the ceiling? A. There were various offers that were

made during the term of or during the duration of the negotiations, yes.

Q. And one of the offers was the company would increase the one cent across the board for a ten cent increase in the ceiling? A. I don't get your question, Mr. Raskin. Would you repeat that?

Trial Examiner: Are you talking of the company or the union increasing one cent across the board?

Mr. Raskin: I should rephrase my question.

Q. Didn't the company offer to increase the rate across the board penny for penny with the increase in ceiling? A. I believe that was one of the positions that was taken during the negotiations up to a maximum of ten cents.

Q. That's right. And this is what you ultimately agreed upon? [207] A. No, that is not.

Q. Well, the ceiling was raised ten cents? A. The ceiling was raised ten cents.

Q. And what were the wages raised across the board? A. Are you talking about incentive or the—all workers?

Q. Incentive rate. A. The rates of the incentive workers were increased ten cents.

Q. So it was penny for penny, wasn't it, it works out that way? A. It worked out that way, yes.

Trial Examiner: I didn't follow this last. If the incentive worker works on a piece work basis, what is the raise in the ten cent rate signify? Is that an hourly rate, ten cents per hour? Ten cent ceiling rate or machine rate?

The Witness: That was a general increase of ten cents all the incentive workers.

Trial Examiner: For all the incentive workers?

The Witness: That's right.

Trial Examiner: Were the regular hourly employees affected by this general increase of ten cents?

The Witness: They were affected in a different manner.

Trial Examiner: I see. But that—

The Witness: They also received an increase.

* * *

[208] Q. (By Mr. Raskin) Mr. Olson, you are aware, of course, of not only of the presence of ceilings but also

of the enforcement that the union from time to time exerted, is that true? A. I was aware that ceilings existed and I heard occasionally that the union did fine employees for violating ceilings, yes.

* * *

[211] Q. (By Mr. Raskin) Did the company in fact pay stewards for time spent in investigating ceiling violations? A. Yes, they did.

* * *

[228] CLARENCE H. BOHMANN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Very well. Mr. Clarence Bohmann having been sworn will take the stand, give his name and address to the reporter.

The Witness: Clarence H. Bohmann, 12320 West Saint Martin's Road, Hales Corners, Wisconsin.

Direct Examination.

[229] Q. (By Mr. Blackburn) Mr. Bohmann, what is your occupation? A. General superintendent of the plant.

* * *

[230] Q. In 1956, as I understand, there was a raise of ten cents an hour; is that correct? A. Correct.

Q. And by factoring if I understand you correctly, factoring is the computations that were made to increase the piece rates so that the workers would then get ten cents more an hour; is that correct? A. Correct.

* * *

[235] Mr. Blackburn: May I ask a question at this point, Mr. Somers, which may help.

Q. The negotiations in trying to decide how much of a raise these piece workers would get was conducted in terms of a raise of so much per hour; isn't that correct? A. Correct.

Q. And the final agreement was that the company would raise their wages twenty and a half cents an hour? A. Twenty and a half cents an hour.

Q. But in order to continue to have a piece rate system, it was necessary to put this twenty and a half cents an hour into the piece rates? A. Correct.

Q. By which these persons, these employees' wages are figured? A. Right. Now, I can explain how we go about doing that if that's what you originally wanted.

Q. That's what we want, sir. A. You take the $1.84 which was agreed upon as the ceiling.

Trial Examiner: What do you mean by agreed upon as the ceiling?

The Witness: Well, the old ceiling was $1.84. Through negotiation it was agreed that we would factor the twenty and a half cents per hour into a rate ten cents below the ceiling so ten cents from $1.94 is $1.84.

Q. (By Mr. Blackburn) So I am sure I understand this, Mr. [236] Bohmann, what you are saying is that in negotiating as to this factoring with the union at that time you agreed with them that you would start at ten cents below their new ceiling; is that correct? A. Correct.

Q. Fine. A. You take the $1.84 per hour and you divide that or multiply that into the twenty and a half cents per hour and you come up with a .11141 per cent of the increase. Now, that per cent is what we take and multiply the old individual piece work rate by to give this employee on a rate of .0711. I am using this example. We took a rate, a legitimate established rate on a particular job which was .0711 and we multiply that by the .1114 percent of increase and we come up with the raise in the rate of .007921251 if you want to carry it out all the way; but we drop those. We make an agreement with the union that we carry out four digits only and stop there, and that brought the rate of .0711 to a new rate of .7902. That was the new rate after the twenty and a half cents was factored into it.

* * *

[243] *Cross-Examination.*

Q. (By Mr. Raskin) As a matter of fact as this exhibit shows, this general method or manner of factoring in increases was carried on through the years following 1953? [244] A. Correct.

Q. And it was repeated in 1955 and other years as well; is that correct? A. Right.

* * *

[246] Q. Do you know for comparison reasons the general average rate of an incentive worker in Milwaukee in your shop as compared with in the area generally in Milwaukee performing similar type of work?

Mr. Blackburn: Objection. Irrelevant and immaterial.

Trial Examiner: Yes. I had previously ruled out a question put to Mr. Olson; but in view of the nature of this issue, I am going to at this time let the witness testify. We may get into a collateral issue and if it does become collateral so that the proceeding runs out of kilter, I'll exercise my discretion to cut that line of inquiry short; but the matter does touch upon some of the basic factors in the legal issue in this case which may make this relevant. I'll accept it then subject to a motion to strike if it turns out to be immaterial.

Mr. Blackburn: Mr. Trial Examiner, I'd like in order to protect the record to record here an additional ground for this objection.

Trial Examiner: Yes, you may.

Mr. Blackburn: So it can be ruled on. I would also object in the light of what you have just said that no proper foundation has been laid. I would suggest perhaps Mr. Bohmann should [247] be asked some questions about his knowledge in this field before this final question is put to him.

Trial Examiner: Well, I had rather assumed that there is some knowledge; but I will accept your suggestion and require that the witness be qualified. It assumes a certain amount of knowledge on the part of the witness. You may ask him whether he has that knowledge.

* * *

Trial Examiner: Well, the better question would be have you ever made a comparison between your rates—

The Witness: Yes.

Trial Examiner: He says he has.

Q. (By Mr. Raskin) And for instance when you went into negotiations with the union, you had material that you had gathered or someone had gathered for you so that it may better guide you in your negotiations with the union; isn't that true? A. Right.

[248] Q. Now, then, from all of that material you gained a certain amount of knowledge as to what the going rate or the average rate of an operator performing the same kind of operations as in your plant is so that you are in a position to compare these rates, right? A. (Witness nodding in the affirmative.)

Q. Now, what is the comparison? Is the average operator in the Milwaukee area performing the same kind of work as yours earning as much as the operator in your plant or less or more; which is it?

Mr. Blackburn: Objection. Form. The question doesn't specify as of what time.

Trial Examiner: Well, the current rate.

Mr. Raskin: Current, yes.

The Witness:

A. I would say the answer to that question is that our employees are earning as much and more than employees performing the same line of work in other plants in the Milwaukee area.

* * *

[249] Q. (By Mr. Raskin) Would you say that the differential between the hourly earnings of an employee in the—in Wisconsin Motor as against the hourly earnings of an employee performing relatively similar work in the Milwaukee area has continued in the same proportion up to the present time from 1955? A. I would say that we have always by our investigation found that we were equal to the other plants or in some cases better.

Q. As a matter of fact, Mr. Bohmann, in 1955 you had material that you presented to the negotiators; that is, the union negotiators, wherein it showed that the manufacturing industries had $1.93 average; in durable goods it was $2.06. In the Milwaukee area the overall average in the Milwaukee area was $2.18; in the Wisconsin area $2.00, and you were paying $2.20 per hour. [250] A. Could be.

Q. That's right. And you have in a sense retained and maintained that leadership, haven't you? A. We are proud of the fact, that's right.

Q. And when we are talking about the $2.20 as an example, we are talking about the average earned rate? A. Correct.

Q. Which, of course, encompasses the ceiling as well, doesn't it? A. Yes, average earned rate is approximately near the ceiling.

* * *

[252] Q. Well, now Mr. Bohmann, you were aware, were you not, that there were ceiling fines imposed for ceiling violations, were you not? A. Yes.

* * *

[253] Q. Did any employee ever complain to you that he was being fined for going over ceiling? A. Several employees that spoke to me and said they were being fined.

[254] Q. How—when was the earliest one? A. Oh, it would be hard to recollect.

Q. Well, how far back did it go? A. Well, to my recollection from the day the ceilings were imposed or first put in by the union there was very little activity as to controlling the ceiling. That didn't take effect until the later years. I would say 1952, '53 that it became apparent that this was going on and as the years went on, more and more up until now when it really got out in the open.

Q. Well, as far as the company was concerned, then it was well aware of it since 1952? A. About that time, yes.

Q. And it was also well aware of the fact that the people were being fined for violating the ceilings? A. Only to the

extent of what the employees told us that they were being find.

Q. You became aware of that? A. That's right.

Q. Did you, did that in any wise disturb you? A. Well, yes, it did.

Q. What did you do about it? A. I myself was one advised them that I wouldn't pay the fine. I says I didn't think it was right.

Q. What did you do as far as management was concerned? A. Continually objected to the ceiling when we had a chance to [255] and we talked about it that it was unfair to put it on and that the employees could earn more money. They were quitting work at two o'clock, one thirty.

Q. But you continued to factor in any increases based upon ceilings as well, didn't you? A. Oh, sure.

Q. Now, Mr. Bohmann, you of course know how a machine rate is obtained, how you reach a machine rate? A. Yes.

Q. How is a machine rate got? A. The original machine rates, the first machine rates that were had was based on what the employee way back, this goes way back into the '30s, of what the employee was earning at that time, group of employees running a certain group of machines were let's say earning seventy cents an hour. That then became the machine rate of that particular group. Up until that time, we had a day rate which we used. Today a machine rate is based on when we buy a machine, we compare it with a machine that's already in the plant already established in a labor grade and we give the union a proposal as to that is where we think the machine ought to be and that should be the machine rate.

* * *

[257] The Witness: Well, by actual years of experience of knowing what the certain jobs ought to pay and by the present machines in the plant we certainly wouldn't have—let's say for instance we have an engine lathe in labor

grade two and we bought another engine lathe but of a different make or model. We certainly propose to the union that the new one be placed in labor grade two with the rest of the engine lathes. We certainly wouldn't say it should be placed in labor grade three or labor grade four. It's based on knowledge of comparison.

* * *

[264] Q. Okay. Now let's approach it in another form. When a job is timed currently, at the present, on a particular machine in a particular grade that the machine is placed, is any consideration given to fatigue time, personal needs, et cetera? A. Oh, yes, when a job is timed.

Q. Yes. And the net result of that is that the engineer who is timing the job together with the representative of the union may agree on what the ultimate piece work charge or cost should be for that particular piece that's produced? A. What do you want to know?

Q. Well, is that the way it's done? A. You take and time a job. You time the operator how long it takes him to make this particular piece—

Q. Yes. A. —including picking it up from the floor, loading it into the machine, bench work or what. When you arrive at this average time that it's taking him, that is then taking the machine rate. You find out how many pieces he must make an hour to produce this particular machine rate. When you have arrived at that, you then add the allowances for personal time, fatigue time, tool time, whatever his needs may be. That's added to it and that is the incentive for the employee to make over and [265] above the machine rate. The machine rate is the minimum what he should make.

Q. Well, when you say minimum, you mean that working at a normal pace? A. Correct.

Q. Any competent operator should earn this particular rate? A. He should earn not less than the machine rate.

Q. Not less? A. That's right.

Q. And if a person earns less than that or makes out less than that, then you may have reason to discipline him,

is that it? A. Yes. We would at least call him in and find out why he isn't making the machine rate.

Q. So that the allowances whichever way you look at it become a factor in this pricing; is that correct? A. Correct.

Q. Now, the allowances are for what? A. The allowances are let's say during the course of the day the operator has to spend a half an hour for grinding tools. Well, it's figured out on a percentage basis how much he needs for tool allowances. He has a certain allowance for personal and fatigue allowance. We give operators an allowance for what we call so-called make up allowance where little incidentals crop up that you don't figure on and those are all part of his [266] incentive to get by or to use as least of those allowances as possible and turn that into money for making beyond the machine rate.

Q. And does that vary in percentage, does that vary from job to job? A. Oh, yes, yes.

* * *

[273] Q. Now, when a person or an operator, rather, in working at his [274] machine makes out or produces or earns an amount which is more than ceiling or rather strike that, which is more than machine rate or earned average rate on a new job and the ceiling that was, that has been established by the union, he therefore utilizes a portion of these allowances, allowance time that was given him through the process of timing; is that right? A. Correct.

Q. So that while the company and the union have agreed that he should have certain allowances for fatigue, personal needs, make up, tools, et cetera, the operator if he uses such time for production itself would be producing more than machine rate or average earned rate depending on the timing job? A. Right.

* * *

[280] Q. Well, I want to make that clear, here. If the company wants to, if it has need for it, the company actually use the pieces that have been produced even though those pieces are beyond the ceiling rate? A. They are

put in the skids and gondolas right along with [281] the rest of them. At the time it happens we don't know they are in there. We can't control it that close to know that he did make some in the bank.

Q. So they are in the flow of production? A. Normally, naturally they would be.

Q. So what is actually held back is the reporting in or the charging the company for all of the pieces? A. Correct.

* * *

[282] Q. Well, do you have a rule which states that a person, an employee shall report all his pieces that he produces in any particular day or on any particular job? A. Not on a particular day. We have a rule that when inventory comes around we will not pay for any material that employees have held back. They have got to have an accurate accounting of their pieces. They have got to be turned in up to date.

Q. As of the time of inventory; is that right? A. That's correct.

Q. But not from day to day?, A. Not from day to day.

* * *

[284] Q. Well, Mr. Bohmann, I asked you to name a single person, a single employee so that we could actually verify it and not travel through the clouds, who was disciplined for not reporting whatever he had produced. Name them. [285] A. I told you there were two employees I know of that were disciplined. I don't remember their name. It was many years ago.

Q. How long ago? A. A good fifteen years.

Q. Well, that would make it about 1947? A. About that.

Q. '46; is that right? A. About that.

Q. And none since that time? A. Not that I know of.

Q. And you couldn't even name the two back in 1946 or '47? A. No. I don't remember his name. All I can say is one was an Irishman. That's all I can remember. I can't recall his name.

Q. Shall we start with O'Brien? A. No.

Mr. Raskin: All right.

Trial Examiner: When you say holding back pieces, you didn't mean that he didn't turn the pieces in for actual use by the company. What you meant was that he didn't report the pieces above a ceiling, is that what you were saying?

The Witness: That's correct. He had them in a bank and he didn't report them in and we had come along and taken inventory and after inventory he started handing these pieces in and the company discharged–

Trial Examiner: When you say handing these pieces in, he started turning them in?

The Witness: Turning them in on a work card.

Trial Examiner: Reporting them?

The Witness: Reporting them, that's right, and in these two occasions the company disciplined by discharging both these employees.

Trial Examiner: Well, did you know there was such a thing as a ceiling set by the union in '46 and '47?

The Witness: Yes, we knew that.

Trial Examiner: All right. Go ahead, Mr. Raskin.

Q. (By Mr. Raskin) Nevertheless, you do know and you do recognize the fact that since 1946 or '47 the bank method of reporting has been continuously used by the employees in the shop? A. Correct.

* * *

[295] Q. Now, your shop works under what might be considered an integration between one department and another through the assembly and the final finish of the job itself or the product itself; is that right? A. Right.

Q. So the question of timing or the flow of goods is pretty–must be pretty well exact, is that it? A. Oh, yes.

Q. In order to come out right? A. Fairly good.

Q. Now, when you begin a day's operation or a week's operation or a job operation, you pretty well know just how the goods are going to flow and just how in what numbers they are going to be produced, do you not? A. Right.

Q. And you know that because the ceiling has a somewhat of a control on the production of the pieces, isn't that true?

Mr. Blackburn: Objection. Form. Conclusionary.

Trial Examiner: Overruled.

[296] The Witness:

A. It's not the ceiling, its' the average earned rate of the employee and the average amount of pieces he makes every day that controls that production.

Q. (By Mr. Raskin) And the average earned rate or the average amount of pieces that he makes today is pretty well established by what he had made yesterday through the process of the ceiling, isn't that true? A. Not always.

Q. Well, what then is the average earned rate? A. The average earned rate is the average amount of earnings that the employee makes from day to day.

Q. So that even beforehand by virtue of the ceiling being part of the price arrangement, you generally know what would be the maximum or near maximum that the employees would produce from one department to another? A. Sure we would.

Q. All right. And by such process it assists you in the integration of the operations and in the final production of the product, isn't that true?

Mr. Blackburn: Objection. Form. Conclusionary.

Trial Examiner: Overruled.

The Witness:

A. Right.

Q. (By Mr. Raskin) Now, when an employee has tool trouble [297] beyond the allowance that was already given consideration in fixing the machine rate, that is considered down time? A. Down time, correct.

Q. And under the contract is the company called upon to pay him something for the down time? A. Right.

Q. And what he's paid is the day rate or— A. It's usually we start out if it's depending on just what the circumstances are. It may be machine rate, it may be a rate between machine rate and his average earnings.

Q. What is it that you do have to pay him under the contract for down time? A. Machine rate.

Q. All right. But actually he's not producing, is he? A. Right.

Q. Therefore, if you were required to pay him as you are under the contract, you would be paying him for non-production operation if we can call it that; is that right? A. Right.

Q. However, if the employee would dip into his bank and report that in lieu of the down time, the company then would be saving that amount of money, would it not? A. So to speak.

Q. Yes. And you know that to be a practice that has been going on in the plant; is that right? [298] A. Right.

* * *

Q. (By Mr. Raskin) Well, would you say that the production of scrap is below normal in your plant? A. Compared to other plants, I would say our scrap is below.

Q. Can you tell us to what factor or factors you could attribute that? A. Good machines, good castings, good workers.

Q. Would you also attribute it to proper allowances? A. Sure.

Q. So that in determining the normal pace and timing a man, taking that into consideration, you give him such allowances that would permit him to produce non-scrap material, is that it? A. Yeah, you could say that.

Q. And in the corollary or the reverse of that would be that if an operator continuously speeded up, continuously used up all his allowances in production proper, it might in effect result in a greater amount of scrap? A. Not unless he got careless.

* * *

[299] Trial Examiner: Well, Mr. Bohmann, the question is simply this: You have stated that these allowances are a factor which account for, are a factor among other factors which account for your having a below record, a

below normal record of scrap. The inquiry is this; that whether an employee's eating into those allowances and engaging in production during times for which allowances have been made say fatigue time, adjustment [300] time, whether under those circumstances the risk of scrap isn't increased as a pure production matter.

The Witness: The risk is increased, sure.

Trial Examiner: You say the risk is increased under those circumstances. In other words, the more the employee eats into the normal allowances you have taken into consideration as setting the rate, the greater the increase of scrap as a production matter.

The Witness: It just so happens we don't have that experience that we get more scrap. I say it increases the risk; but we are not—

Trial Examiner: That's the only question being asked, whether it would increase the risk.

The Witness: We are not faced with it.

* * *

[312] HAROLD A. TODD

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. (By Mr. Blackburn) What is your full name and address, sir? [313] A. Harold A. Todd, 1919 Forest Street, Wauwatosa.

Q. And what is your occupation, Mr. Todd? A. President and general manager of Wisconsin Motor Corporation.

* * *

[320] Q. What has caused the decline in the number of Wisconsin Motor shop employees since 1951? A. Reduction in sales.

Q. And what has caused the reduction in sales? A. Primarily competition, especially in our engines up to and

including about nine horsepower where we are—where we have the greatest amount of competition in there especially with Briggs and Stratton, Clinton, Lawson, Kohler, our prices of our engines are inherently higher than the comparable sized engines of the companies that I just mentioned because we put certain items in those engines which are expensive and makes for a quality engine that the other companies do not put into [321] their engines. These items are recognized as increasing the quality of the engine by the purchasers of the—of those sizes of engines. In those sizes, in those customers, let's put it that way, our purchasers of those sizes of engines, there is two classes of people. There is one class in there that buys strictly and only on price. There is another classification or class of purchasers of those size of engines who buy on quality. The people that buy on quality will and do pay the increased price that we have to get for our engines over that competition. The other class of purchasers buys strictly on price and I can remember one day there when I argued with a purchaser of engines. I argued with him for pretty nearly on all day with a difference of price of ten cents between our engine and a competitive engine. We had several cases not too long ago where we lost some very sizeable orders because of our price was too high over the competition. It's our feeling that if there were no ceilings we would get increased production which, of course, we would have to pay for the pieces that would be produced but we would have more labor to spread our overhead over especially our fixed burden which would serve to reduce our costs and thereby enable us to be more competitive.

* * *

[325] *Cross-Examination.*

Q. (By Mr. Raskin) Mr. Todd, you say that your company produces a pretty good quality engine? A. I not only say it, I'll swear to that.

Q. And is that made possible in part by the operators and the employees who are members of this union? [326]
A. In part undoubtedly.

Q. You do give them credit for that, don't you? A. Oh, yes. I'll give the devil his due any time.

* * *

[332] Q. (By Mr. Raskin) Mr. Todd, has the company paid dividends consistently over the last twenty five odd years? A. Over the last what?

Q. Twenty five odd years? A. No.

Q. Over how many years? A. Not exactly sure; but consistently, I think only since my recollection goes back to about 1946. I am saying consistently, now.

Q. That means, of course, that you never missed a dividend since 1946? A. Right. It could be later than that. I think it is. I am not sure.

Q. You are pretty proud of that record, too, aren't you, Mr. Todd? A. Oh, yes.

Q. And during all that time there was a ceiling in the plant, wasn't there? A. Yes. I presume so. Yeah, since '46, yes.

* * *

[362] CLARENCE H. BOHMANN

resumed the stand, and, having been previously sworn, was further examined and testified as follows:

* * *

[369] *Re-Direct Examination.*

* * *

[372] Q. (By Mr. Blackburn) Mr. Bohmann, on a given day a piece worker, through no fault of his own cannot produce any pieces at all and he doesn't have anything in his bank to show as production for that day. At what rate is he paid?

Trial Examiner: He's paid the machine rate. We have gone over that.

The Witness: That's right.

Q. (By Mr. Blackburn) He's paid the machine rate? A. If he can't produce any pieces through no fault of his own, he's paid machine rate.

Q. What is the day rate in the contract? A. The day rate is a rate which he gets for let's say for instance he makes scrap. He's paid day rate. We don't pay him his piece work earnings, we don't pay him machine rate, we pay [373] him that day rate. Employees used to be paid day rate for the taking of inventory. Different items. That's what the day rate is for.

Q. And does it follow that day rate is the minimum amount of pay that the employee can get from the company under the contract? A. Day rate is the minimum amount of pay he can get in any instance.

Q. Under whatever circumstances? A. Under whatever circumstances.

Q. Has the company ever fired anybody who was making the machine rate because he failed to make the ceilings? A. Not to my knowledge.

* * *

[374] Q. And at the time of inventory do the employees' banks have to be emptied out? A. That's correct.

Q. So at the beginning of the new year after inventory everybody starts fresh; is that correct? A. Everybody starts fresh.

* * *

[381] Q. (By Mr. Raskin) All right. It's an accepted fact, is it not, Mr. Bohmann, that as far as the company knowledge and information is concerned that the employees generally abide by the ceiling provision? A. Yes.

* * *

[401] RUSSELL YOUNG

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination.

Q. (By Mr. Blackburn) Where do you work, Mr. Young? A. Wisconsin Motor Corporation.

[402] Q. What job do you hold? A. General foreman.

* * *

[403] Q. What time does the day shift go to work, Mr. Young? A. The day shift starts at seven o'clock.

Q. And from your observations over the years, what time do the employees actually begin working? A. Well, if we were to take an average between seven and seven ten, I'd say a fair figure or a clock reading would be about seven five.

* * *

[405] Q. (By Mr. Blackburn) And what time does the day shift end [406] according to the contract? A. The day shift ends at three o'clock.

Q. And on the average from your observations over the years, when do the employees actually stop working?

Mr. Raskin: That's objected to as—

Trial Examiner: Well, let him testify. Well, overruled.

The Witness:

A. At one forty five.

* * *

Trial Examiner: When do they go home, Mr. Young? You say they stop working at one forty five. When do they leave the plant?

The Witness: They are allowed to punch out on a normal day at five minutes to three.

Trial Examiner: I see. All right.

Q. (By Mr. Blackburn) And what do they do between one forty five and five minutes of three on the average day?

Mr. Raskin: Objected to as immaterial.

Trial Examiner: Same ruling.

The Witness:

A. What do they do again—

[407] Q. (By Mr. Blackburn) Yes. A. —between one forty five and three o'clock?

Q. Or five minutes of three when they are permitted to punch out. A. Multiple things. There was a time when they'd sit out and the plant looked similar to a library.

Some of the boys will go to the locker room and put on their street clothes minus their outside garments weatherwise. There was a time they played cards all of which has been stopped. I would say they engage in conversation and twiddle their thumbs at the present time.

* * *

[415] Q. (By Mr. Blackburn) Mr. Young, are you familiar with the [416] five per cent personal time and five per cent fatigue time as it figures in the work at Wisconsin Motor? A. If you are referring five per cent personal and five per cent fatigue in light of establishing rates, yes, I am familiar.

Q. I think that's what I mean, Mr. Young. If you translate that five per cent plus five per cent into ten per cent and then apply it to an eight hour day, how many minutes do you get? A. It would be forty eight minutes.

Q. And what are those forty eight minutes meant to be used for by the employees? A. Those forty eight minutes that are averaged into the piece work rate are solely there for one purpose; for the man himself. For example, if an engine is clocked and time studied at machine rate and the rate comes out to $4.00, we will add five per cent personal and five per cent fatigue and a card will be written out for $4.40. That is for the employee to go to the men's room, go to the soda dispenser, get a package of cigarettes, candy bar, perhaps go to the tool crib for his personal face towel and it is used up the minute the shift starts.

Trial Examiner: What do you mean it's used up the minute the shift starts?

The Witness: By that I mean the forty eight minutes is attached as the shift starts. For example, if said number of people go to the lavatory. He is in the process of using up the [417] forty eight minutes.

Trial Examiner: But—I will try to understand. You said it's used up the minute the shift starts. I thought it could only be used up after the shift starts.

The Witness: I think I worded that wrong. It is used up as the day progresses would be better.

Trial Examiner: I see. All right.

Q. (By Mr. Blackburn) The ten minute morning lunch period, is that figured as part of the forty eight minutes a day? A. No, sir.

Q. And how about the fifteen minute noon lunch period? A. No, sir.

Q. In other words, the forty eight minutes a day is for the use of the employee in addition to those two breaks during the day? A. Yes, sir.

Q. Mr. Young, can those forty eight minutes be considered in the time that the employees are not working in and around the morning lunch period, in and around the noon lunch period and during the period at the end of the day at which they are not working?

The Witness: Repeat that once more, please.

Trial Examiner: Want to read that question to Mr. Young, please.

(Last question read.)

[418] Mr. Blackburn: You understand my question? Perhaps I can rephrase it, Mr. Young.

The Witness: I think I understand it.

Trial Examiner: Will you answer it, then.

The Witness:

A. It is segregated from those down times. That forty eight minutes is used up while actual production is taking place. The rate card says so. If I build an engine that calls for a $4.00 piece work rate and to that has been added a ten per cent allowance for my person, then any time I step back, talk to a buddy of mine, light a cigarette, go to the lavatory, contact my steward on some personal business whether things are being handled right or I have an objection, it is continually being used up in light of building the engine.

Q. (By Mr. Blackburn) So that employees when they are on the morning lunch period, the noon lunch period, and the time at the end of the day at which they are not working are not utilizing the forty eight minutes provided for them in the five per cent personal time and five per cent fatigue time which goes into the machine

rate or piece rate computations; is that correct? A. That is correct.

* * *

[420] *Cross-Examination.*

* * *

[425] Q. Have you—strike that. Have you ever filed a grievance with—strike that. Following your discussions with management about all these troubles and problems that you have, has there ever been any decision made that you had to carry out with respect to stop working at earlier than the shift is over? A. You are specifying what is on these sheets now?

Q. Yes. A. Or early shift?

Q. Well, any one of the shifts. A. All right. The question again is what?

Mr. Raskin: Read that question.

(Question read.)

The Witness: My answer to that question is yes. Let's go into the reading situation where we sit down, our good people and read books after they are through working. That was taken to top management and something was done about it.

Q. (By Mr. Raskin) I see. And the reading was cut out, is that it? A. I'd say ninety nine per cent. Here and there they are getting by with it yet.

Q. That takes care of the reading. What other decisions did you carry out following your bringing to the attention of management all of these problems that you have? Maybe I can help you. The card playing was cut out, right? A. That popped up just the other day. They were playing cards [426] down there at twenty minutes to one.

Q. But you stopped it, didn't you? A. I hope it stays stopped and the stewards cooperate very nicely.

Q. All right. We got the reading taken care of, we got the card playing taken care of. What else is there that you carried through?

* * *

The Witness: In explanation in light of the card playing and the reading, the primary purpose to remove that since it is a manufacturing plant was to make it undesirable and there is [427] nothing worse in my humble opinion on a human being than to sit idle for three hours a day.

Mr. Raskin: Well—

Trial Examiner: Well, that really is the important part of Mr. Raskin's question to mean not the method as to how to spend their time after production stops but the issue of whether production should stop. Has management done anything about that, about the question as to whether production should stop at a given time earlier than the regular time as you have recorded it?

The Witness: Well, yes, that would be out of my scope, Mr. Raskin. I think I understand you better now. I think during the past few days it has been brought out that Mr. Olson, Mr. Bohmann, people concerned in negotiating the contract had endeavored to get the union to raise their AER.

Q. (By Mr. Raskin) All right, Mr. Young. I take it that as far as you are concerned as general foreman there have been no directions or orders given you with respect to the early shutting down of some of these machines; is that right? A. That's right.

Q. Nobody was disciplined for it; is that right? A. For shutting down early?

Q. Yes. A. We have used—

Q. Well, now, answer that yes or no. [428] A. Yes, yes.

Q. Now name them. A. We have used discipline.

Q. Name them. A. We have used—

Mr. Zahn: Mr. Examiner, I submit the witness be allowed to answer the questions.

Trial Examiner: What do you understand by discipline? Now you answered no. Now what do you understand discipline to be? What kind of discipline did you have in mind?

The Witness: I have disciplined in light of faulty workmanship. For example, a line getting through early—

Trial Examiner: Yes.

The Witness: —and we have contacted and worked out with the union through their stewards with the people on the line in light of rectifying their errors, company naturally pays the bill which is day rate. That is a discipline because somewhere down the line their earnings do get hurt. Away from the actual shut down say it would be one thirty, one o'clock, two o'clock, no discipline has ever been given because a man sat down. Discipline has been given for reading, for card playing and so forth. Discipline has been given for leaving the department and sunning themselves in the back yard, yes, sir; but not for the actual shutting down of the line.

* * *

[429] Q. (By Mr. Raskin) Now, the employee doesn't get paid for his lunch period be it in the morning or in the—later on, is that true? A. The incentive employees do not.

* * *

[435] Q. Did you ever make a study as to the most productive hours of an employee, Mr. Young? A. Yes, sir.

Q. Would you say that his most productive hours are the first hours, the first few hours that he comes into the plant? A. Yes.

* * *

[461] GEORGE KOZBIEL

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination.

Q. (By Mr. Doppelt) And where are you employed, Mr. Kozbiel? A. Wisconsin Motor Corporation.

Q. And how long have you been so employed? A. Sixteen years.

Q. And what is your position there? A. I am a bench hand.

Q. And have you been a bench hand for sixteen years? A. No. I was a rotomatic operator. I was a milling machine operator, drill press operator, babbiter.

Q. All right, fine. And are you also a member of Local 283 UAW? A. Yes.

Q. And how long have you been a member of that union? [462] A. Sixteen years, since I been there.

Q. And have you ever held a position with the union? A. Yes.

Q. What position did you hold? A. I was a steward.

Q. And when were you a steward? A. 1959.

Q. In 1959? A. To 1960. Yes, 1959, 1960.

Q. Now, while you have been with Wisconsin Motors, have you exceeded these production ceilings? A. Yes.

Q. And have you exceeded them regularly? A. Yes.

Q. And did you exceed production ceilings in February of 1961? A. Yes.

Q. And in April of 1961 were you fined by the union for exceeding production ceilings? A. Yes.

* * *

[466] *Cross Examination*

Q. (By Mr. Raskin) Mr. Kozbiel, how long have you been a [467] member of the Local union, the Respondent in this case? A. Since I started. I believe 1945.

Q. And your membership in that union has been continuous? A. Yes.

Q. Have you from time to time attended any Local union meetings? A. Yes.

Q. Have you participated in Local union affairs in any way? A. Yes.

Q. As an officer? A. Yes.

Q. In what office did you hold? A. Steward.

Q. And when did you first become a steward? A. I believe it was 1959.

Q. And how long did you hold your stewardship? A. Till February of 1961 when I was suspended.

* * *

[468] Mr. Doppelt: Mr. Examiner, I think the General Counsel will stipulate the trial was held in accordance with the UAW constitution and rules of the UAW constitution.

Trial Examiner: All right.

* * *

[508] DALE L. STEINFELDT

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

* * *

[509] Q. Have you at any time held office in the union? A. I have.

* * *

[511] Q. Now, I have already shown both counsel what I am now going to submit to the witness. Will you tell us what your records show with respect to prior convictions and fines of Mr. Emil Stefanec with respect to ceiling violations? A. These records indicate that Emil Stefanec prior to the time that he was charged with the present violations was called to the ceiling violations committee hearings for violations occurring first time on May 29, 1957, at which time a $1.00 fine was assessed and the second time on July 24, 1958, at which time a $1.00 fine was assessed and then suspended.

Q. Now, give us the same responses as to when previous convictions and fines were assessed against Scofield. A. According to the information here, Russell Scofield was [512] guilty of a first violation on August 20, 1946, and on the second violation on February 16, 1954, at which time he was warned. The third violation of which there were three, the dates 5-29-57 and September 16 of 57, total of three violations, fined $3.00. Again he was called in for violations for the period of December 1, 1959 to December 18, 1959, consisting of sixteen individual violations. At that time he was fined $1.00 for each offense or a total of $16.00. On March 24, 1960, the committee says he was called in on

five violations and fined $1.00 for each violation or a total of $5.00.

* * *

[515] Q. And have you from time to time observed the action and conduct of the various employees both within your department and outside of it with respect to quitting work at any particular time before the shift— A. I have.

Q. And what have you seen and observed? A. Well, to answer that question properly I think I'd have to dispute the—

Q. Well, just never mind what you have to—you just go right to it and speak. A. Well, Mr. Young testified yesterday that the assembly floor concluded their full day's production in somewhere around five hours. Now, this I dispute as incorrect on this basis; that on the assembly lines when the engines cease to go off the end of line which would represent the group's production ceiling for that particular day, the various line assemblers then take up other duties which consist of preparing for the next day's production involving assembling of sub-assemblies which would be assembled to the engine the next day, preparing their other material such as sheaves on bearing plates and cap screws and lining up the material in general for the next day's production.

Q. Now, are they paid for that time? A. They are paid for that time out of that day's production of the group.

[516] Q. In other words, they are not paid any additional sums by the company as so-called down time or anything of that kind? A. No.

Q. How many employees—let's assume now that we refer to your group of some 120. How many employees would that involve? A. Well, first of all 120 is the man power complement of all the assemblers in department five which is broken down into five separate groups. On my particular line to which I am assigned, I think at the present time we have in the vicinity of twenty five men. Of these twenty five men, I would say that somewhere between fifteen and twenty would be involved in the side assemblies and other duties after the engines actually stop going off of the line.

Q. Now, is this a daily process or does it vary from week to week? A. It's an essential daily process because had this not been done, it would be impossible for the group to make ceiling wages the next day.

Q. So that what the employees do following the shut down of the machines proper is in the nature of preparation and production work? A. That is correct.

Q. Are you familiar with other parts of the plant with respect to such practices? A. I am.

[517] Q. And what can you state generally is the conduct of the other employees? A. Well, in the other manufacturing vicinity departments I would say primarily the same principle prevails; that after the machines shut off and the pieces actually stop flowing from that machine on that particular day, the operator then assumes other duties in preparation for the next day's production such as preparing his tools, lining up his material, cleaning the machine, and so on.

* * *

[521] Q. Did you participate in—before that year? A. In 1956 I did.

Q. Okay. And this also was during the period of the strike? A. That's right.

Q. And was the subject of ceilings discussed at that time? A. To great lengths.

Q. Yes. And what were the positions taken by the respective parties?

Mr. Blackburn: Objection. Conclusionary.

Trial Examiner: That's a general question.

Mr. Raskin: I am trying to hurry this thing.

Trial Examiner: The point is was there any discussion with the company which the union stated to the company, what it sought to achieve by the ceilings.

Mr. Raskin: That's right.

Trial Examiner: By the production ceilings.

Mr. Raskin: Will you answer that question. I'll adopt the question as proposed by the Trial Examiner.

Trial Examiner: Do you understand that question?

The Witness: Not entirely, Mr. Examiner.

Trial Examiner: Well, did the union representatives tell the employer's representatives just why they had a production ceiling?

The Witness: Yes.

Trial Examiner: And why they were—why they justified [522] the particular production ceiling there?

The Witness: Yes.

Q. (By Mr. Raskin) All right. Will you tell us that. A. Well, during the strike the production ceilings were one of the main points of disagreement and the union steadfastly held to the principle that we thought that our production workers had just about reached their capacity in productive power and that any increase in the ceilings would result in a hardship or physical, mental and otherwise being placed on them and if the production ceilings were removed or increased to any great extent that this would result in the company making efforts to change the methods used on productive jobs and subsequently reduce the rates and this in turn would result in lesser amount of production employees being employed by the company.

Q. And as a result of these discussions ultimately a new method, a new ceiling was adopted, is that it? A. That is correct.

* * *

[524] Q. (By Mr. Raskin) Mr. Steinfeldt, did you at any time as secretary of the union receive any requests or communication either orally or in writing by any of the four charging people that they desired to withdraw from the union? A. I have not.

* * *

[548] NORMAN A. WOLD

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Will you please be seated and give your [549] name and address to the reporter.

The Witness: Norman A. Wold, 2034 South 79th, West Allis.

Direct Examination

Q. (By Mr. Raskin) Is the "A" for Al? A. "A" is for Al, that's right.

Q. And that's what you are usually called? A. In the shop, yes.

Q. How old are you? A. I am now sixty eight years old.

Q. And where had you been employed? A. Wisconsin Motor for the last twenty five years.

Q. And are you now retired? A. Correct.

Q. How long ago did you retire? A. June 1.

Q. 1961? A. 1961.

Q. At the time of your retirement, what kind of work were you doing? A. I was working on a drill press, probably a large drill press in the shop, working on the incentive system.

* * *

[552] Q. Relate that to the subject of the ceilings. A. We figured it was taking up too much of our time and well, we talked it over. We called a group of fellows over. So somebody made the suggestion, I can't think of the—well, why don't we call a meeting, get a meeting, get those fellows together, those fellows that's interested in this thing. So I went over from one department another and I pick up a representative [553] group from each department, each line, and we met in the cafeteria. We talked this thing over for not one meeting, we talked it over five or six meetings. I'd say that maybe more, but at least five or six. Well, what are we going to do, fellows, and we had one fellow there that we were talking about ceilings. That's when the ceiling thing first come up. We talked about well, what are we going to do. We have got to do something. You know, in the shop there around Thanksgiving Day or near Christmas, why there was layoffs and the fellows were getting older. Some of the fellows were getting older and the young fellows would come in

and they would push, push, push, push, so we wanted to see that this labor state keep as many fellows working as we possibly could, and we know if we put this thing on there it would provide for at least a few more fellows to stay at work. So we thought the thing over. I'd say that it wasn't any board of directors. It was the group. They voted on it at the union and they have had many a chance over the years to kick it out or put it in or whatever. In fact, it has been brought up and I'd say ninety eight per cent of the fellows right today are 100 per cent for this ceiling because it provides jobs. It provides for not too much pressure working piece work fellows. I don't know whether you have ever done that or not; but there is always a pressure, a pressure all the time. You want to make out. You want to make as much as you can up to a certain point and we figured well, here's [554] a leaving off period and we made a survey of this district around here number ten. We went all the way to Detroit. We looked at different contracts. We contacted different people to try to get as fair a rate as we possibly could. So we was over to Chicago on the labor board then and—

Q. This was in 1944? A. 19— it was, I think it was.

Q. You so testified, so go ahead. A. We wanted to set up classifications. That's what we did up there, classifications. That's where you get your five grades. So I think Mr. Wurtz and Mr. Todd and oh, Mr. Olson and myself, maybe another one or two. I think Ray Daniels was there, and we probably went up there maybe three meetings, four meetings, and finally the labor grade was set up and then as we knew, there was a war on, we didn't want to hold back anything, but we also wanted to provide jobs for the fellows and well, I say we had a time study man there at one time.

* * *

GENERAL COUNSEL'S EXHIBIT No. 12

AGREEMENT

Between

WISCONSIN MOTOR CORPORATION

and

INTERNATIONAL UNION UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (AFL-CIO) LOCAL 283

Dated: May 1, 1959

* * *

ARTICLE XI.

WAGES

90. Section 1—

A. Jobs shall be so priced as a result of a time study that the average competent operator working at a reasonable pace shall earn not less than the machine rate of his assigned task.

B. Old jobs will be re-studied or the rate reestablished on a job when the employee working on the job cannot make the machine rate while working at a reasonable pace and using the normal allowances. On re-studies the same time study procedure and allowances will be applied as on new jobs.

* * *

95. Section 6—

When a piece work employee fails to make out on a job through no fault of his own and has notified his Foreman, he shall receive an allowance through his Foreman in an amount that will permit him to make not less than his machine rate, or the Foreman can give him an allowance that will bring his earnings somewhere between the machine rate and his average earned rate. This will also apply to:

1. Hard castings.
2. Excessive stock.
3. Service work where there is no established rate.
4. Minor repairs of machines, jigs or fixtures with the approval of the Foreman.
5. When rebuilding lines on the Assembly Floor.

* * *

99. Section 10—Under the following conditions machine rate will be paid:

A. Salvage work. If such service or salvage work is longer than two (2) hours duration, the Company will make every effort to establish a temporary piece work rate.

B. Excessive tool trouble (this shall not include tool changes provided for in the piecework price.)

C. Waiting for material or jobs, for all time when such waiting exceeds two (2) periods (of six (6) minutes each) and the Foreman has been notified.

100. Section 11—Under the following conditions, day rate will be paid:

A. Cleaning machines (where there is no established rate).

B. Lost time (power failure, waiting for tools, where the operator is negligent, or waiting for a job when it is two (2) periods (of six (6) minutes each) or less).

C. General clean-up and trucking.

D. When a piecework employee fails to make out on a job through no fault of the Company.

* * *

109. PIECE WORK CLASSIFICATIONS:

	Machine Rate	Day Rate
GRADE 1	$2.455	$2.24

* * *

GENERAL COUNSEL'S EXHIBIT No. 14

CEILINGS

A. The basic objective of the Union is, to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a Union Member.

B. Any member violating these ceilings, shall be subject to a fine of One Dollar ($1.00) for each violation. The violators shall be processed by not less than 3 nor more than 5 members of the Executive Board.

In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.

* * *

GENERAL COUNSEL'S EXHIBIT NO. 22

August 14, 1956

STRIKE SETTLEMENT AGREEMENT

This Agreement made this 14th day of August, 1956 by and between the Wisconsin Motors Corporation and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local 283.

The parties agree that the 1954-6 contract shall be modified by substituting the language contained herein, where such may modify or be in addition to the language in said contract.

* * *

WAGES: The day rate classifications will be increased as follows, and each employee working in a labor grade shall have this individual rate increased in the amount that labor grade is increased.

LABOR GRADE 1A, 1B, and 1 ..... .18
LABOR GRADE 2A and 2 ..... .17
LABOR GRADE 3A, 3B and 3 ..... .16
LABOR GRADE 4A and 4 ..... .15
LABOR GRADE 5 ..... .14
LABOR GRADE 6A and 6 ..... .13
LABOR GRADE 7 ..... .13
LABOR GRADE 8 ..... .13
LABOR GRADE 9 ..... .13
LABOR GRADE 10 ..... .05

The incentive classifications day rates and Machine rates shall all be increased ten cents (10¢) per hour and each employee's individual rate shall also be increased 10¢ per hour. This amount shall be added on the "Clock Hour" in addition to the three cents (3¢) presently added until this total thirteen cents (13¢) can be factored into the incentive rates. The factoring in the incentive rates shall be made on the same basis as was made on 10-8-53.

The Wage increases provided herein shall be made effective May 1, 1956.

CEILINGS: The ceilings on earnings is to be raised ten cents (10¢) per hour above the general increase of 1-1-56 and the ten cents (10¢) of 5-1-56 or a total of 23¢ per hour.

* * *

Signed this fourteenth day of August 1956

FOR THE COMPANY: FOR THE UNION:

_____ _____

_____ _____

ment was not challenging the cases embodying controlling doctrine, but was merely claiming that this case was distinguishable from them. The nature of controlling doctrine will be amplified in our conclusionary discussion, but for purposes of clarifying the development of the issue, it will be briefly summarized here. The doctrine controlling under Board lore is embodied in such cases as *International Typographical Union (American Newspaper Publishers Association)*, hereafter foreshortened as the *"ITU"* or *"ANPA"* case,[6] and *Minneapolis Star & Tribune Co.*[7] In the *ITU* case the Board, with the Seventh Circuit affirming it on that point (*supra*, n. 6), held that not all union action that restrains or coerces offends 8(b)(1)(A), one exception thereto being unions' internal rules and the exertion of internal disciplinary powers to enforce them. The one involved in *ITU* was a rule requiring members to work only under illegal closed shop conditions, and it was held that the union's threat to expel members who did not comply was immune under the proviso, and not a violation of 8(b)(1)(A). In *Minneapolis Star*, the Board held that under the interpretation of the proviso as enunciated in the *ITU* case, a union's assessment of a fine upon members for violating a rule against working during a strike was likewise not a violation of 8(b)(1)(A).

The essence of these cases is that a union is immune under the proviso as long as the sanctions used to compel conformity with a given rule or policy, whatever its content or character, are confined to its internal powers of discipline over members, and that liability under 8(b)(1)(A) begins only where these internal sanctions leave off. That

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6. 86 NLRB 951, 955-7 (1949); affirmed as to that point; *ANPA* v. *N.L.R.B.*, 193 F.2d 782, 800, 806 (1951), cert. denied as to that point 344 U.S. 812 (1952).

7. 109 NLRB 727 (1954).

is to say, a union loses its immunity under the proviso when the measures used to compel conformity with a given rule of policy reach outside the membership confines, but retains it when it stays within them.

On the premise that controlling doctrine as above enunciated was accepted by government counsel as the point of departure in the consideration of the issue here, I had assumed that the Government's theory of liability was based, as in such case it would have had to be, solely on the single factual variance of this case from *Minneapolis Star*—namely, that the Union here did not assess the fine as an added condition of membership under penalty of expulsion if not paid, but as a debt asserted as collectible without regard to retention of membership, and hence, so I had assumed the Government's position to be, this action took the fine outside the inner compass of the membership relation.

Confirming me in that impression was the conclusion of a colloquy initiated toward the end of the third day of hearing. The Government, as part of its own case was still developing, in some detail, the history of the production rule and its administration at the Employer's establishment. Since counsel for the Government and for the Union were anxious to have these matters developed, and I thought it would serve a useful purpose in presenting the living situation out of which the issue arose, Government counsel were permitted to develop this matter as part of their own case. At the stage where it seemed that that expository purpose had been served, I inquired as to the need for further elaboration of the subject. Government counsel indicated that it was intended as anticipatory refutation of certain assertions in the answer to the effect that the rule was administered with employer knowledge and acquiescence, and that it had beneficial consequences.

Since Government counsel disclaimed that the negation of such assertions was a part of the Government's theory of liability, there ensued the colloquy which confirmed my original assumption concerning the government's theory as previously described—as follows:

> TRIAL EXAMINER: . . . Wouldn't it be in point then to ask you what are you challenging? Are you challenging the fact that the Union in its councils had set a production ceiling? I would ask you that and what would your answer be?
>
> MR. BLACKBURN: My answer would be no.
>
> TRIAL EXAMINER: Are you challenging the fact that the Union in its negotiations with the Employer seeks to have the employer go along with the production ceiling? Would you challenge that?
>
> MR. BLACKBURN: No I would not challenge that.
>
> * * *
>
> TRIAL EXAMINER: . . . . Suppose the union passes a resolution that an employee, pardon me, any member who doesn't cooperate in the production ceiling program will lose his eligibility for membership, nothing more. Would you challenge that?
>
> MR. BLACKBURN: No, I would not challenge that.
>
> * * *
>
> TRIAL EXAMINER: *But isn't it a fact that what you do challenge is that the sanction for the fine goes beyond expulsion from membership and extends to the realm of an absolute obligation on the part of the member to the Union?*
>
> MR. BLACKBURN: *Yes.* (Emphasis supplied.)

The briefs indicate that I had perhaps not accurately gauged the position of the proponents. They do not seek

to distinguish *Minneapolis Star*. Rather do they ask that the doctrine of that case be rejected in the light of an opinion in a case decided last year by the Seventh Circuit. That is the Court which had earlier sustained the Board in the *ITU* case (*supra*, n. 6), which provided the underlying rationale of the Board's decision in *Minneapolis Star*. The case in question is *Allen Bradley Co.* v. *N.L.R.B.*, 286 F.2d 442. Although the issue there concerned not an alleged violation by a union, but by an employer, a portion of the opinion is devoted to a discussion of the same type of issue as in *Minneapolis Star*, and expresses a different view from the one embodied in that case—in short, that the assessment of a fine on a member for disobeying a rule against strikebreaking is not immune under the proviso of 8(a)(1)(A) but is a violation of its prohibition.

In urging that the doctrine of *Minneapolis Star* be rejected in favor of the dictum expressed by the Court in *Allen Bradley*, Counsel for the Charging Parties indicates outright that this would require a reexamination of controlling doctrine, as embodied in *Minneapolis Star*. While Government counsel suggest that inroads have already been made upon that doctrine by the Board itself in later decisions (which, as later indicated, *infra* n. 50, happens not to be so), the press release (R-818) issued by the General Counsel at the time the complaint was authorized indicates that the purpose thereof was to have the doctrine reexamined in the light of the *Allen Bradley* dictum.

The normal policy in such an instance, is for the Trial Examiner to apply controlling doctrine, and dispose of the request for reexamination as a matter "appropriately to be addressed to the Board."[8] However, in view of the source of the request and the factors presented for *de novo* consideration, there is warrant for departing from normal

8. *Florence Brooks*, 131 NLRB 756, 773 (1961).

APPROVED BY THE INTERNATIONAL UNION,
UNITED AUTOMOBILE, AIRCRAFT AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA - (CIO)

Harvey Kitzman, Director
Region 10

Walter F. Cappel,
International Rep.

James Stern - International Rep.

[Signatures omitted in printing]

GENERAL COUNSEL'S EXHIBIT No. 24

	Day Rate	Machine Rate	Ceiling Per Hour	Ceiling For 8 Hours
GRADE 1	$2.24	$2.455	$2.90	$23.20
" 2	$2.155	$2.37	$2.835	$22.68
" 3	$2.065	$2.28	$2.755	$22.04
" 4	$1.985	$2.20	$2.685	$21.48
" 5	$1.90	$2.115	$2.62	$20.96

An additional 10¢ Cost of Living is added to each hour worked.

RESPONDENT'S EXHIBIT No. 8

CONSTITUTION
of the
INTERNATIONAL UNION
UNITED AUTOMOBILE, AIRCRAFT
AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA,
UAW
Adopted at
Atlantic City, N. J.
October, 1959

* * *

ARTICLE 30

Trials of Members

SECTION 1. A charge by a member or members in good standing that a member or members have violated this Constitution or engaged in conduct unbecoming a member of the Union must be specifically set forth in writing and signed by the member or members making the charges. *The charges must state the exact nature of the alleged offense or offenses and, if possible, the period of time during which the offense or offenses allegedly took place.* Two (2) or more members may be jointly charged with having participated in the same act or acts charged as an offense or with having acted jointly in commission of such an offense and may be jointly tried.

* * *

SECTION 10. The Trial Committee, upon completion of the hearing on the evidence and arguments, shall go

into closed session to determine the verdict and penalty. A two-thirds (⅔) vote shall be required to find the accused guilty. In case the accused is found guilty, the Trial Committee may, by a majority vote, reprimand the accused; or it may, by a two-thirds (⅔) vote, assess a fine not to exceed one hundred dollars ($100) with automatic suspension, removal from office or expulsion in the event of the failure of the accused to pay the fine within a specified time; or it may, by a two-thirds (⅔) vote, suspend or remove the accused from office or suspend or expel him from membership in the International Union.

* * * *

INTERMEDIATE REPORT AND RECOMMENDED ORDER

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

LOCAL 283, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO (WISCONSIN MOTOR CORP.)

Respondent

and

Case Nos. 13-CB-1059-1
13-CB-1059-2
13-CB-1059-3
13-CB-1059-4

RUSSELL SCOFIELD, an individual,
LAWRENCE HANSEN, an individual,
EMIL STEFANEC, an individual,
GEORGE KOZBIEL, an individual,

Charging Parties

Benjamin K. Blackburn and
Lawrence F. Doppelt, Esqs.,
of Chicago, Ill., for the General Counsel.

Max Raskin and *Herbert Bratt, Esqs.*,
of Milwaukee, Wis., and
Lowell Goerlich, Esq., of Washington,
D.C., for Respondent.

Edward J. Zahn, Jr., Esq., of *Karcher &
Zahn*, of Burlington, Wis., for the
Charging Parties.

Before: *A. Norman Somers*, Trial Examiner.

Statement of the Case

This proceeding was heard before me in Milwaukee, Wisconsin, on January 9 to 12, 1962, on complaint of the General Counsel and answer of Respondent.[1] The issue was whether Respondent Union, in assessing fines upon certain of its members, who work for Wisconsin Motor Corporation, for exceeding certain production ceilings established under a rule of the Union, and in thereafter instituting civil suit in a State court to collect them, violated Section 8(b)(1)(A) of the Act.

The parties waived oral argument at the close of the hearing, but there was a good deal of discussion of the issue before then, largely in the course of my efforts to

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1. Procedural chronology: The charges were filed May 18, 1961; the original Order of Consolidation and Complaint was issued December 1; and the Amended Order of Consolidation and Complaint (Hereafter termed "the complaint") was issued December 11, 1961.

obtain definitive statements of the opposing legal positions, and to shorten the hearing in the light of them. Also, the parties have filed briefs which have been duly considered. Upon the entire record,[2] and my observations of the witnesses, I make the following:

Findings of Fact

I. The business of the Employer

Wisconsin Motor Corporation, hereinafter referred to as the Employer or the Company, is a Wisconsin corporation, having its plant and place of business in West Allis, Wisconsin, where it manufactures, sells and distributes motors. In the course of its operations it ships products directly to points outside the State in excess of $50,000 annually, The Employer is conceded to be in a business affecting commerce and the propriety of the Board's asserting jurisdiction in this case is not in contest.

II. The labor organization involved

Respondent, Local 283 of UAW-AFL-CIO, referred to as the Union, is a labor organization within the meaning of the Act. Its membership consists exclusively of employees of the Employer, with whom it has had contractual relations continuously since 1937, the current contract being in force since May 1, 1959.

III. The alleged unfair labor practice

A. *The issue (including a synopsis of its aspects at the hearing, and thereafter in the briefs)*

On April 8, 1961, the Union assessed a fine upon the charging parties, as members of its organization, for

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2. As corrected on notice to the parties, and as supplemented by an exhibit proffered by Respondent after the hearing, which was added to the record without objection.

violating its long-standing rule relating to "production ceilings," and on October 2 of the same year, it brought suit in the state court to recover the amounts of the fines. The proponents of the complaint[3] contend that by these actions the Union violated Section 8(b)(1)(A) of the Act, which declares it to be an unfair labor practice for a labor organization "to restrain or coerce employees in the exercise of their rights guaranteed in Section 7 [of the Act]." Contrariwise, the Union contends that its conduct in each instance is immune under the proviso of 8(b)(1)(A), which declares that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."[4]

The legal issue thus presented could well be decided on the basis of the facts presented in the opening sentence above. At least one would have thought so under the body of authoritative Board and Court doctrine interpreting 8(b)(1)(A) and its proviso over the 15 years since enactment of the Labor Management Relations Act (the Taft-Hartley Law) of 1947.[5] Yet the history of the rule and the manner of its administration at this Company's establishment from its genesis in 1944 consumed nearly all of the government's 4-day presentation of the case. They will also receive substantial treatment in our ensuing factual discussion. The reason is stated below.

Throughout the hearing, I had assumed that in claiming that the fine here offended 8(b)(1)(A), the Govern-

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3. This includes, apart from the General Counsel, also the Charging Parties, on whose charges the complaint was issued, and who have been ably represented by separate counsel.

4. Sections 7 and 8(b)(1)(A) are quoted in Appendix A, attached to this Report. Included also are other provisions of the Act, which bear upon the issue here to be decided.

5. 61 Stat. 136, hereafter referred to variously as "the Act" or "LMRA."

policy here. In this kind of situation, it would seem appropriate that the matter come before the agency after preliminary consideration thereof at the initial level of the Board's adjudicative process. And so the various contentions in support of the requested reexamination of controlling doctrine will be considered here.

Insofar as both proponents take a common position in urging the rejection of the doctrine of *Minneapolis Star* in the light of the *Allen Bradley* dictum, the matter will be treated in parts (1) through (8) of the Conclusionary Discussion. And although, so far as appears, proponents do not rely on it, for purposes of completeness of treatment, we will also at the outset of the Conclusionary Discussion consider the theory of liability as I had originally assumed it to be, based upon the single factual variance here from *Minneapolis Star*, previously described.

It should be said, however, that apart from the position thus taken in common with counsel for the Charging Parties, Government counsel urge upon us a drastic revision of established conceptions concerning the scope of the issue before us and of our attendant powers in respect thereto, which goes beyond anything suggested in the *Allen Bradley* dictum. Its reach extends not only beyond *Minneapolis Star* but *ITU* as well. It envisages a power in us to pass upon whether a union rule is "reasonable," under a test which includes an appraisal of its social desirability. We treat this aspect of the Government's position—from which counsel for the Charging Parties expressly dissociates himself—in part (9) of the Conclusionary Discussion.

In view of the broadened front on which Government counsel thus present the issue, the factual exposition of the origin, purpose and manner of administration of the rule here in question at the Employer's establishment will be

given in a bit more detail than had originally been envisioned as necessary for treating the narrow legal issue here involved.

B. *Nature, history and operation of production ceilings plan at the Employer's establishment*

1. The union-security provision in the contract

The Union, as stated previously, is composed entirely of employees of the Company and has had contractual relations with it since 1937. The current contract, like those for a number of years preceding, provides that as a condition of retention of employment, each employee, after the requisite 30-day period, has the option of either joining and maintaining good standing in the Union, or rejecting membership but paying the Union a "service fee."

2. Scope of the production ceilings rule

The "production ceilings" rule applies to those members who are employed by the Company on jobs compensated on the piecework, or "incentive" basis. These comprise little over half of the working force, which currently is about 850.[9] The "ceiling" sets a limit not on production as such but on the hourly rate that the pieceworkers shall earn in excess of the minimum rate as guaranteed them under the contract. By way of explanation, the pieceworkers, while paid on the basis of the price per piece produced, are, in actual fact, under the contract, guaranteed a minimum rate per hour for any given job. This is called the "machine" rate. The machine rate varies for

9. The remainder work on a "flat" time basis. The jobs compensated on the incentive basis are those capable of being timed, as distinguished from those not lending themselves to such process, such as cleaning, repairing machinery, etc.

each of the five "labor grades" into which a job falls, the highest being for grade 1, which requires the most skill, and so on in descending order of requisite skill and attendant "machine" rate per hour down to grade 5.[9a]

The subject of the contractual negotiations between the Employer and the Union, insofar as they concern the piece-workers, is the guaranteed "machine" rate per hour for each of the five labor grades. The machine rate as fixed by the contract is translated into the piecework rate under a process called "factoring in." The formula for doing so when a raise in hourly rate has been agreed upon, and the rate that ceiling itself plays in it, will engage our attention in due course, but the governing principle is expressed in the contract as follows:

> Jobs shall be so priced as a result of a time study that the average competent operator working at a reasonable pace shall earn not less than the machine rate of his assigned task.

The machine rate makes allowances for factors such as setting up the job, picking up and loading, cleaning of tools, fatigue, attention to personal needs, etc. An incentive worker who earns the machine rate is regarded as having met the minimal requirements for satisfactory performance. To the extent that he foregoes the allowances previously mentioned and converts them into productive effort, he can, on the basis of the piece rate as established under the "factoring in" process, earn more than the hourly machine rate. The setting of a limit or a "ceiling" upon earnings thus made in excess of the machine rate is what the rule here involves.

9a. There is an even lower rate, called the "day" rate for each grade, which applies to periods when through no fault of the Company the incentive worker is not engaged in actual production or has produced "scrap." This does not concern us here.

3. Adoption of the production ceilings rule and its modifications

The production ceiling rule was formally adopted by vote of the membership in 1944. It had its forerunner as a "gentlemen's agreement" among them since 1938, when the Union's executive board recommended that "pieceworkers turn in no more than time and half in any one day in order to conserve work and avoid layoffs."

The resolution of 1944 was to the effect that "the men turn in no more than 10 cents per hour over and above the new machine rates." In 1946, the membership voted penalties, in the form of fines, for violation of the rule. From time to time the rule has undergone modifications, and has its current embodiment in the following language:

> A. The basic object of the Union is, to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of this rule is guilty of conduct unbecoming a union member.
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> B. Any member who violates these ceilings shall be subject to a fine of one dollar ($1.00) for each violation. The violators shall be processed by not less than 3, nor more than 5 members of the Executive Board.
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> In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.[10]

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10. "Conduct unbecoming a Union Member" is the generic offense cognizable under Article 30 of the constitution of the International. Under a detailed procedure of charges, trial and penalty. The penalty includes suspension and a fine ranging from $1 to a maximum of $100. The same article prescribes that failure to pay the fine within a prescribed period can result in expulsion from the Union.

The amount of the ceiling has been raised over the years as a result of collective negotiations with the Employer, to be described later. The ceiling currently in effect is between 45 and 50 cents above the machine rate (*infra*, n. 11).

4. What compliance with the ceiling rule entails: the process of "banking."

The expression "turn in" as used in the resolution does not apply to the pieces produced. These, when made, are turned over to the Company and physically enter the flow of its operations. Nor does it apply directly to the pace at which the worker is to produce. It applies solely to what the operator is to enter on his work card for purpose of payment. If he has produced at a pace yielding him an hourly rate above "ceiling," he holds back reporting to management the quantity in excess of what will earn him the ceiling rate. This is done under a process called "banking," which is described below.

The "bank" is the employee's own record of the production yielding him in excess of the ceiling rate. This he keeps in reserve for a "rainy day," *i.e.*, when he has earned less than ceiling. This last can occur when he has been absent, or when his machine is "down," and he is forced to be idle. For that idle period, he would, under the contract, normally receive his machine rate (and under certain circumstances not here pertinent, even the lower "day" rate (*supra*, n. 9a; *infra*, n. 11). However, by drawing upon his reserve or "bank," he can make the ceiling rate. When he does so, the Company pays him for the now reported items previously produced, and is spared any other outlay for the idle period. It should be explained that although, as a *member* of the Union, a pieceworker is required under the ceiling rule thus to "bank" his excess, *as an employee*, he is permitted by the Company to exercise

his choice either way. The Company does not require that the employee follow the ceiling rule, nor has it ever bound itself contractually to require the employee to do so. If the employee chooses to follow the rule, the Company will honor his choice by permitting him to "bank" his excess (subject to all "banks" being emptied by inventory time). On the other hand, if he chooses to disregard the rule, and to report and be paid for his entire production, the Company will gladly pay him, however much above the ceiling rate this will bring his earnings. But when he has done so *as an employee,* then so far as the Union is concerned, as a *member,* he has violated the production ceiling rule, and that is what constitutes the "conduct unbecoming a union member" (*supra,* n. 10), which is the subject of the fine.

5. Implementation of the Rule: inspection of work records

The process of checking upon compliance with the rule, in use from the time that the penalties were first enacted in 1946, is as follows: Twice a year, the Union procures from the Company the work-cards, for a given day chosen at random, of every one of its members who are engaged in piecework. The cards are then distributed among the various stewards, who check them to ascertain whether a member's earnings as reported have exceeded the ceiling for his grade as it appears in a posted schedule.[11] He then

11. That schedule is prepared by the Union, but for purposes later appearing, management retains copies for its own reference. The current schedule of rates as follows:

	Day Rate	Machine Rate	Ceiling per hour	Ceiling for 8 hours
Grade 1	$2.24	$2.455	$2.90	$23.20
Grade 2	2.155	2.37	2.835	22.68
Grade 3	2.065	2.28	2.755	22.04
Grade 4	1.985	2.20	2.685	21.48
Grade 5	1.90	2.115	2.62	20.96

turns over to the Union the cards of those members showing earnings in excess of ceiling. The Union then procures from the Company copies of the work cards of those persons for the entire preceding quarter year, to ascertain the extent to which during that period, they exceeded ceiling. They are then called before a trial board and asked if they concede the accuracy of the data on the cards. If they do, they are asked for an explanation, and if the explanation is unsatisfactory, they are served with charges and tried before a trial board. The trial board then determines whether these members have thereby been guilty of "conduct unbecoming a union member" and, based upon the degree of "persisten[cy]," fixes the penalty within the limits previously described (*supra*, n. 10). It is then reported to the membership for approval, and when that is given, it takes effect.

That was the procedure which was followed in the cases of the Charging Parties. A random card check made on February 14 and 15, 1961, showed that they and two others had exceeded ceiling during the last quarter year. On March 2, 1961, each was served with charges of having engaged in "conduct unbecoming a union member," supported by a detailed description of violations of the rule, described therein as "deliberate and persistent," and notified that a trial committee would be selected at a meeting of the membership, at which he could appear with counsel. After trial held on notice, they were informed of the verdict and told that it would be presented to the full membership for approval, and on April 11, they were notified of the membership's approval of the verdict and the recommended penalty, which included a year's suspension from membership and a fine payable within 30 days. Charging Parties Scofield and Kozbiel were assessed the maximum fine

permissible under the U.A.W.'s Constitution, of $100, Hansen $75 and Stefanec $50.[12]

6. The Employer's role in the administration of the ceiling program; and the role of ceiling in the wage structure

Much of the Government's brief is devoted to the proposition that the Employer has never "agreed" to the production ceiling rule and that the production ceilings are, as indeed the complaint alleges, "unilaterally" established by the Union. The matter is hardly germane. Every union rule originates with it and is thus unilateral in its very nature, so that if enforcement thereof were vulnerable for that reason, it is difficult to see what function the proviso to 8(b)(1)(A) could serve.

However, for whatever importance Government counsel attach to the matter, it would appear rather clear that the details of the administration of the rule hardly lend themselves to characterization on this all-or-nothing basis. The rule has a unilateral source, but its administration has numerous bilateral aspects. The description even as thus far given reveals a role played by the Company which is rather vital to its effectiveness. We may assume, without deciding, that management, if it insisted, could reject the "banking" process and require every pieceworker to report

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12. The remaining two of the six paid up. The Charging Parties appealed to the International and were advised that under the Constitution the fine must be paid before the appeal could be entertained. They then filed the charges with the Board's Regional Office, which were dismissed by the Regional Director on August 22, 1961. The Union on August 25, 1961, then wrote demanding payment under threat of suit, which, as stated previously, was brought on October 2. On November 22, 1961, the office of the General Counsel in Washington directed issuance of the complaint in this proceeding (press release R-818).

and be paid for his full production on a current basis. Yet it leaves the choice either way with the employee, and, with full knowledge of its purpose, it supplies the Union with the work cards used in making the semiannual check on compliance with the rule. Further, it recognizes the time spent by the stewards in making such a check as being on legitimate union business, which under the contract, stewards may engage in without loss of pay.

Even more significant would appear to be the mutual recognition of the ceiling rate as an integral part of the wage structure. Among the subjects embraced by the contract negotiations is the setting of the ceiling rate. The purpose of doing so is to bind not the Employer but the Union. The Employer retains its freedom to pay any member who reports production yielding him in excess of ceiling, but the Union binds itself in respect to the limit which it will permit its members to earn above the guaranteed machine rate. The higher the ceiling the greater the productive leeway. And so in the typical negotiations, the Employer begins by asking the Union to agree to eliminate the ceiling, and as the second alternative, proposes a raise in the ceiling. As an inducement therefor, it may offer a concession in the form of a raise in the guaranteed hourly machine rate, and the raise in turn conditions the extent to which the Union will agree to raise the ceiling. Exemplifying this process are documents reflecting the negotiations for specific years of 1953 and 1956—in 1953 during a contract reopening period, and in 1956, in the course of contract renewal discussions culminating in a strike over certain unresolved issues. The latter included the extent to which the Company would go in raising the hourly machine rate and the extent to which the Union would go in raising the ceiling. The 1956 strike settlement agreement shows a compromise reached in respect to each item, the Employer agreeing to a raise in the guaranteed

hourly rate, and the Union, in turn, agreeing to raise the ceiling.

The ceiling rate is the common point of reference used by management and the Union in two other vital respects—first in the manner of "factoring" the hourly rate raise into the piece rate, and secondly in passing upon grievances over allowances on specific jobs. As to the first, the raise in the piece rate is determined on the basis of the ratio which the raise in the hourly machine rate bears to the old ceiling rate. This was spelled out in an elaborate formula prepared and posted by management after the agreement of 1953; and in the 1956 strike settlement agreement, it was specifically provided that that same method would be used in "factoring in" the hourly rate raise granted that year. As to the second, the record includes writings showing management to have disposed of grievances of employees concerned with allowances on specific jobs, on the basis of whether other employees had or had not made "ceiling" on them.

7. The opposing viewpoints toward ceiling as expressed at the bargaining table and repeated at the hearing

The status thus achieved by the ceiling program is the product of hard bargaining, however diverse the philosophies voiced at the bargaining table by the respective representatives and repeated by them at the hearing.

Their differing statements of position exemplify the polarity of management and labor viewpoints on incentive or piecework plans, as described in the host of authoritative treaties on the subject. (See Appendix B; Van De Water, pp. 107-108) It hardly matters whether one accepts all, some or none of the underlying economic premises of either side, for, as indicated in the Conclusionary Discus-

sion (part (9)), that is normally left to the parties to work out for themselves in a free society, until the legislature takes cognizance of and acts on a given practice.

On the one hand, the Union justifies the ceiling rule on the basis of apprehensions, which, as the literature on the subject would indicate, have their roots in industrial experience with incentive plans of earlier vintage, some of which have been acknowledged by management spokesmen as having been reasonably grounded. (See App. B, Louden, pp. 105-106) These include expressed concern that a stepped up pace could result in: (a) employees working themselves out of jobs, (b) usher in the evil of "stakhanovism," under which a new productive norm is set, whereby the piece rate is lowered and the compensation for actual productive effort correspondingly reduced, (c) lower grade employees by excessive dissipation of their allowances, earning more than those in the higher ones, thus dislocating the actual pay scale and bringing about morale-threatening jealousies, as well as undermining the health-protecting purposes of the allowances.

The management tune is a different one. Its representatives assert that it is wrong not to let the members "earn as much as they can," and during negotiations, they counter the Union's demand for an increase in hourly pay rate with the suggestion that the employees can earn more by producing more under the rate currently in effect—the very thing which to the Union conjures up the specter of stakhanovism. They state also that it is only a matter of time before the pieceworkers catch up with a raised ceiling, and when they do so, all except those who choose to defy the rule, shut off their machines during the latter part of the day, well before punching out time; additionally, there is a mass idleness when the "banks" are emptied out before inventory time, or before the vacation period; and finally,

if the men produced to their full capacities and were paid accordingly, the fixed overhead being the same, the Company's unit cost would be lessened and its competitive position strengthened.

Government counsel present these statements of management, including the conclusionary assertion "we never agreed to ceilings," as the very distilled essence of management's position. In so doing, they fail to make due allowance for the adage in folklore, given to status also in adjudicative doctrine, that "actions speak louder than words."[13] Management's assistance in the administration of the plan, while indeed stemming from its realization that it has the overwhelming support of the rank-and-file, may well be due to a greater sympathy with some of its objectives than is reflected in its broadsides at the negotiating table. This may be for reasons of its own self-interest, quite apart from the fact that some people high in its management ranks, such as Plant Superintendent Bohmann and Assistant Superintendent LaSage, underwent considerable exposure to the rank-and-file point of view when they were union functionaries during the presupervisory stages of their careers with Wisconsin Motor. One watching Superintendent Bohmann and President Todd, as they expressed their pride in the Company's highly superior product and extraordinarily low scrap rate, for which they gave ungrudging credit to the workmanship of the incentive force, rather got the impression that if there were no production ceiling set by the Union, management would be inclined to devise some equivalent manner of its own to insure the continued high quality of the performance. Strongly suggesting it was Plant Superintendent Bohmann's

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13. *St. Louis Independent Packing Co.* v. *N.L.R.B.*, 291 F.2d 700, 705 (C.A. 7, 1951); *N.L.R.B.* v. *Ritzwoller*, 114 F.2d 422, 436 (C.A. 7, 1939).

acknowledgement that this preeminently low scrap rate could well be imperiled if the pieceworkers became obsessively preoccupied with production.

Also, other admissions made by these officials, as well as their general demeanors, would indicate that they are less worked up about the production ceiling plan than, if one were to take at face value the sweeping diatribes against it in their brief, Government counsel would appear to be. Thus Bohmann, apart from acknowledging that there was a saving to the Company when the employee draws on his "bank" for compensation during a "down" period instead of receiving his machine rate, also acknowledged that the ceiling enables the Company to forecast the maximum production of the various departments and that "by such process it assists [the Company] in the integration of the operations and in the final production of the product." On that score, he expressed further pride in the fact that the average hourly earnings of the incentive workers of the Company under the ceiling plan exceed those of employees in comparable industrial establishments in the region. This rather indicates that their productivity compares favorably with that of the work forces in the other establishments. And President Todd, who generally reflected the mellowing influence of his long years, when asked by Government counsel the reason for certain competitive difficulties of the Company, gave as his first answer not added costs under the production ceiling, but salesmanship—the task of educating the market to a due appreciation of the advantages of a superior product of world renown over an ordinary one, which would more than compensate for the higher price paid. He then testified that reduction in unit costs would help too; whatever its source. Union counsel apparently sought to claim as another laurel for the ceiling plan an admission by Presi-

dent Todd that since 1946, which happens to be the year when the Union began to enforce the ceiling rate, the Company, after prior periods in the red, has paid dividends uninterruptedly. In so doing, I would think that counsel waded rather knee-deep into the *post hoc* fallacy; but human nature being what it is, it may be assumed that management does not hold that coincidence against the program.

It is true that management does feel that there is too wide an interval of idleness between the time of day the incentive workers have produced enough to earn the ceiling rate and the end of the shift. But that bears on two basic subjects which are the staples of the bargaining process—namely, (a) the adequacy of the hourly machine rate, as fixed by the contract, and (b) assuming agreement as to the first, the adequacy of the ceiling itself. Each is typically a subject of interest-conditioned viewpoint whose reconciliation is the very purpose of the bargaining process.

As to (a), we have quoted the clause of the contract, which indicates that the guaranteed hourly rate reflects the minimal productive expectancy of a worker of average competence working at a normal pace. This, as the clause indicates, as based on a time study. The clause itself is the oepning section of a comprehensive article of the contract (XI) containing detailed procedures for retiming jobs on the basis of time studies. So far as appears, the Company has not complained that the guaranteed hourly rates have been so set that the employee, for the pay he receives, has not given the requisite *quid pro quo* in production.

As to (b), the Company's objective in seeking agreement from the Union for a higher ceiling is, in the light of (a) above, not based upon any claim that under the ceiling it receives less production than what it is paying for. The subject of negotiations in respect to the ceiling is the extent

to which the employees should convert their allowances to productive effort for the purpose of earning more. This involves striking the balance between, on the one hand, management's interest in having pieceworkers produce and earn to the maximum of their capacities, and on the other, the interest of the group as a whole in determining the point at which those comprising it can avail themselves of that inducement consistently with preserving the basic purpose of the allowances themselves.

In essence, therefore, bargaining over the ceiling rate concerns the extent to which the group as a whole can be induced to forego these allowances in exchange for compensated productive effort. This is manifestly a matter affecting the interest of the group and in which its collective bargaining strength hinges upon the cooperation of its individual components.

The measures which the group, in the person of the union, may, consistently with the Act, exert upon the individual, in the person of the member, to conform with the policy adopted by the group, and the kind of measures which it is forbidden to exert for that purpose is the subject at issue. The remainder of this document will be devoted to it.

C. *Conclusionary discussion*[13a]

(1)

Controlling doctrine has been reexamined in the light of the purpose of the proviso as manifest on the face of the

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13a. There will be no discussion of the Union's additional defense that the complaint is barred by the 6 months limitation provision of Section 10(b), other than to say that I adhere to my original ruling rejecting it. The fact that the rule for which the fine was assessed originated more than 6 months before the filing of the charges would not bar prosecution for the assessment, which occurred within the 6 months period. *Local Lodge No. 1424* v. *N.L.R.B.*, 362 U.S. 411, on which the Union relies for that defense, is not applicable here.

statute and as declared by the sponsors of 8(b)(1)(A) during its enactment. These are discussed in the ensuing subsections. Upon such reexamination, and for the reasons later stated I conclude that the scope of the prohibition of Section 8(b)(1)(A) as limited by the proviso has been correctly interpreted by controlling authority, as embodied in the decisions in *ITU (ANPA) and Minneapolis Star* (*supra*, n. 6 and 7). The result is that the rule here, and the discipline imposed as a sanction for it being part of the internal affairs of unions, are not within the scope of 8(b)(1)(A), as limited by the proviso. Accordingly, the Union did not violate Section 8(b)(1)(A) in assessing the fine for disobedience of its rule.

Neither did the Union violate 8(b)(1)(A) by suing in the State court to collect the fine. This last is so for reasons quite apart from, and without regard to whether the assessment of the fine itself would violate 8(b)(1)(A). The reason is that in such matters, it is Board policy to "accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice." *Clyde Taylor Co.*, 127 NLRB 103, 109. The presumption in such instance is that the State courts can be relied upon to give due effect to whatever law controls, and hence there would have been no need to enjoin the suit even if it had been based on a claim in conflict with or otherwise preempted by Federal law. See *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 311 (1955). Neither of these is the case.

(2)

As more fully developed in part (8) below, the conclusion, hereafter discussed, that the assessment of the fine was not a violation of 8(b)(1)(A) does not imply that such conduct is affirmatively protected by the Act. It

means merely that the conduct has not been subjected to regulation under the Federal statute. The effect of the immunity under the proviso is thus to leave the internal union-member relationship in respect to the matter here at issue subject exclusively to State law. This last bears upon the one element of factual difference here from that in *Minneapolis Star* which, as I have stated in the introduction, I had assumed had been the basis of the government's position—namely, that the Union here has asserted the fine as a debt, without exercising its power under the constitution (*supra*, n. 10) of making it payable under pain of expulsion. Although, as I have also noted in the introduction, the proponents do not appear to rely upon this variance from *Minneapolis Star*, I have considered it preliminarily for purpose of completeness of treatment. After such consideration, I conclude that the same principle controls here as in *Minneapolis Star* and *ITU*. This is because, as amplified later, Congress, in declaring the internal affairs of unions immune under the statute, left them where it had found them—outside the Federal policing power and subject to the laws and policies of the individual States. Accordingly, the dispute between the Union and the Charging Parties out of which this proceeding has arisen concerns the rights and obligations of unions and their members in respect to each other. As already stressed and as will be discussed in more detail in part (8) below, that field is not reached by our statute, and is governed by State law. The Supreme Court of the State of Wisconsin construes a "union's constitution and bylaws [to] constitute a contract between the union and its members,"[14] The Supreme Court of the United States observed in the

14. *U. A. W.* v. *Woychik*, 5 Wis. 2d 528; 93 N.W.2d 236; 43 LRRM 2741.

Gonzalez case[15] that "this contractual conception of the relation between a member and his union widely prevails in this country." And so the matter of whether a union is limited to making a fine a mere further condition of membership or may press for its payment as a debt without regard to retention of membership is a subject of State law: it involves the interpretation and effect which the courts of a given jurisdiction will give to the financial obligations arising under the union-member relationship—whether they be dues, special assessments, or disciplinary fines. On that point, it happens also that the Supreme Court of the State of Wisconsin, applying its previously enunciated premise that the "constitution and bylaws . . . constitute a contract," (*Woychik* case, *supra*, n. 14) has held that the obligations incurred by a member pursuant thereto are collectible as a debt. That is so with respect to ordinary dues,[16] and also with respect to a disciplinary obligation, such as a fine, as in the *Woychik* case—the fine in *Woychik* having been, in fact, for violation of the same kind of rule as in *Minneapolis Star*, one requiring observance of a strike.

The above considerations, however, hardly conclude the issues in the suit in the State court between the Union and the Charging Parties. The record indicates that the suit involves a miscellany of disputed issues between them concededly out of our concern on any basis—such as the validity of the ceiling rule itself under the Union's constitution and bylaws, as well as of the penalty, and indeed, whether the latter is truly a debt as opposed to being a mere added condition of membership under the terms of

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15. *International Ass'n of Machinists* v. *Gonzalez*, 356 U.S. 617, 618 (1955).

16. *Local 261 U. A. W.* v. *Schulze*, 3 Wis. 2d 562; 89 N.W.2d 191. 42 LRRM 2177 (1953).

the constitution. All of these matters, including the validity of the substantive ground for the imposition of the penalty under State law or policy, are outside our purview and are matters to be resolved by the duly constituted tribunals of the State in applying its own law and policy.

(3)

If we are right in construing the proviso as negating on intention to interfere with the internal affairs of unions, that should dispose of the two grounds advanced by the proponents for overruling the doctrine of *Minneapolis Star*. The first is that a fine does not fall within the category of "rules with respect to the acquisition or retention of membership," and the second is that even if it does, it still constitutes coercion within the meaning of 8(b)(1)(A), because it is a sanction for a rule which places a restriction on the manner in which members shall work on their jobs.

Each proposition is based on the dictum of the Seventh Circuit in *Allen Bradley* to be treated later, but at this stage, it is appropriate to observe that the argument, in each of its facets, misconceives the scope of both clauses of 8(b)(1)(A). It interprets the prohibiting clause too broadly even apart from the proviso; and it interprets the proviso too narrowly. We treat each in that order.

As to the first, the proponents construe the prohibiting clause as having the purpose of interdicting any union action of any character, which by inference can be said to have a restraining or coercive effect on employees' organizational rights under Section 7. The legislative history, treated later, shows the clause was not intended to have that broad a reach. That was the basis of the Supreme Court's decision rejecting the Board's doctrine in *Curtis Brothers* relating to the application of 8(b)(1)(A) to

picketing by a minority union to compel recognition.[17] The *Curtis Brothers* doctrine was enunciated by the Board before Congress enacted the Labor Management Reporting and Disclosure Act of 1959,[18] which, under the amendments to our Act as embodied in Title VI of that law, specifically covered that subject in present Section 8(b)(7) of our Act. In *Curtis Brothers,* the Board had held that picketing by a minority union for recognition was a violation of 8(b)(1)(A). The ground was that if the union achieved its purpose, it would saddle the employees with a bargaining agent not of their own choosing, contrary to their rights under Section 7, thereby restraining and coercing them in the exercise of those rights. The Court held that the broad "reach" thus given 8(b)(1)(A), even if "the words might permit" it, was negated by the legislative history showing it to have had a more limited purpose. Expressing its agreement with the "Board's own interpretation" of 8(b)(1)(A) in an earlier line of cases beginning with *National Maritime Union,*[19] the Court concluded that "§ 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation and reprisal or threats thereof."

The above undermines the premise that the prohibiting clause of 8(b)(1)(A) has a legal scope as broad as its language even in respect to conduct not involving the proviso. As to the proviso, it may be said that until *Allen Bradley,* it was uniformly interpreted by Board, Courts, and legal commentators as excepting from

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17. *N.L.R.B.* v. *Drivers, Chauffeurs, etc., Local 539 (Curtis Brothers)*, 362 U.S. 274 (1960), setting aside 119 NLRB 232 (1957).

18. 73 Stat. 519, hereinafter referred to as the LMRDA.

19. 78 NLRB 97 (1948), enfd. 175 F.2d 686 (C.A. 2) (1949).

the prohibiting clause conduct involving the internal relations of unions with their members. On that basis the Board in the *ITU* case (*supra*, n. 6) held that the Union there did not violate 8(b)(1)(A) in requiring its members under penalty of expulsion, to work only under closed shop conditions, laid down by it on employers. This was so even though the Board held that in laying down these conditions upon employers, the Union had violated Section 8(b)(2) (quoted in Appendix A of this Report) which forbids unions to cause or attempt to cause employers to discriminate against employees in violation of Section 8(a)(3) (also quoted in Appendix A). On the same ground, the Seventh Circuit, on review of the Board's *ITU* decision in the *ANPA* case (*supra*, n. 6), upheld the Board's dismissal of the 8(b)(1)(A) allegation against the Union. The Court pointed to the limited scope of the prohibiting clause, stating that "the coercion of employees by a labor organization is illegal only to the extent that it is declared so by Congress" (p. 800), and concluded its discussion of the proviso with the observation that:

> . . . the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their memberships as they see fit. (p. 806.)

The above hardly leaves room for a distinction based upon whether the penalty was expulsion, as in *ITU*, or as in *Minneapolis Star* and here, a fine; and as appears in the legislative history treated in part (5) below, Congress intended none.

The portion of proponents' position which attacks the fine because it is a sanction for a rule prescribing how the members may work embraces a premise which if accepted, would require a result not only contrary to that in *Minneapolis Star*, but overruling *ITU* as well. It is difficult to conceive of a rule more offensive on the score ad-

vanced by proponents than the one in *ITU*. The rule there did more than just limit the members' exercise of their rights under Section 7: it required them to abet the Union in conduct illegalized by the Federal statute. Hence the exoneration of the Union under 8(b)(1)(A) could only have rested upon a criterion of liability which disregarded the content of the rule and considered only the measures used to enforce it. The enforcing measure being an internal union discipline, the immunity was complete, even though the rule for which it was a sanction could not have more clearly, indeed more flagrantly, prescribed the conditions under which the members should work.

Proponents' argument on both scores overlooks the distinction between the members' rights as *employees* and their rights as *members*. The Act protects the first and not the second. This is manifest from the scheme of the Act as a whole, treated in the ensuing subsection, and is confirmed by the legislative history, treated in the one that follows.

(4)

As to what is manifest concerning our issue on the fact of the statute:

The Act on its face shows that a member's rights *as an employee* are protected from any consequences which a union can visit upon his tenure on the job by virtue of its control over membership. The protection is given by the previously mentioned limits placed by Section 8(a)(3) and 8(b)(2) upon the enforcements of union-security contracts. By these provisions, Congress acted to deprive unions of the power they had over employees' jobs under the closed shop proviso in Section 8(3) of the Wagner Act (49 Stat. 449) through their control over membership. Under the old proviso, a union having a closed shop contract

could deprive an employee of his job by excluding or expelling him from membership, regardless of the cause.[20] To overcome this, Congress in 1947 enacted the 8(a)(3) and 8(b)(2) restrictions upon union-security contracts. Those relevant here as earlier mentioned, forbid an employer to discharge or discriminate against an employee when he has reason to believe the employee has been denied or deprived of membership for any reason other than failure to tender periodic dues and initiation fees; and a union is correspondingly forbidden to cause or attempts to cause an employer to discriminate against the employee in such a situation.

The result of the above, as the Supreme Court put it in the *Radio Officer's* case,[21] is to "insulate the employee's job from his organizational rights" by leaving him free *as an employee* to be a "good, bad, or indifferent" member subject only to his obligations under a union-security contract to tender the requisite dues and initiation fees.

These provisions have been interpreted to give the employee even greater leeway. Under the Board's judicially upheld doctrine in *Union Starch*,[22] an employee has met the condition of employment under a union-security contract by tendering the periodic dues and initiation fees, even though he refuses to be a member. In the case before us, the freedom which the Charging Parties enjoy on that score by operation of law is confirmed by the subsisting contract. The pertinent clause, as earlier noted, permits them to pay a "service fee" in lieu of membership.

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20. *Colgate Palmolive Peat Co.* v. *N.L.R.B.*, 338 U.S. 355 (1950); *DeMille* v. *AFRA*, 31 Cal.2d 139, 187 P.2d 769 (1947), cert. denied 333 U.S. 876 (1948).

21. *Radio Officer's Union* v. *N.L.R.B.*, 17, 40 (1954).

22. *Union Starch and Refining Co.*, 87 NLRB 779 (1949), enfd. 186 F.2d 1008 (C.A. 7).

Under the Act, therefore, the Charging Parties, as employees were at all times masters of their fate, and still are. They could have avoided putting themselves under obligation to obey any union rule, by availing themselves of the option of tendering dues in lieu of membership. Under the Act, they still have that choice in respect to any obligations toward the Union in the future. However, under the choice made by them the other way, they assumed such obligations as flowed from the contractual relationship thus voluntarily entered into. Its legal effects, as between them and the Union, are governed by the law of the State in which they made their compact. And yet, even in respect to these obligations, the Act protects them, as employees, from any union efforts to enforce them by consequences on their jobs.

Whatever the obligations of the Charging Parties toward the Union *as members*, they are free agents *as employees* provided they satisfy their dues obligation. As employees, they can flout the production ceilings rule or any other union rule, even one not prescribing how they shall work, such as one requiring regular attendance at meetings. They can do so, as already stressed, without fear of any consequences upon their jobs. The Union may not cause the Employer to discriminate against them for violations of the Union's rule.[23] Highlighting this is the Board's decision finding an employer and a union to have violated the Act because an employee was discharged for not conforming with a union rule of the character here involved,

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23. *Radio Officers, supra,* n. 21; *N.L.R.B.* v. *Philadelphia Iron Works,* 211 F.2d 937 (C.A. 3, 1954), enforcing 103 NLRB 596 (1953); *N.L.R.B.* v. *Local 1423,* 238 F.2d 832 (C.A. 5, 1956), enforcing *Columbus Show Case,* 111 NLRB 206 (1955); *N.L.R.B.* v. *Brotherhood of Painters,* 242 F.2d 477 (C.A. 10, 1957), enforcing 114 NLRB 1171 (1955).

one limiting production.[24] As employees also, the Charging Parties are free under our statute to refuse to pay the fine, for since it is not a part of "periodic dues," the Union may not cause them to be discharged for such nonpayment,[25] or threaten to do so.[26] And this is so even if the fine should be upheld by the State Court as a valid obligation owing to the Union. (*Supra*, n. 26)

But while, *as employees*, the Charging Parties are free under the Federal statute to disregard every union requirement, except that relating to dues, *as members*, they are subject to obligations outside of our reach, because our statute does not touch the incidents of that relationship.

In the *Gonzalez* case, previously cited (n. 15), the Supreme Court saw it that way from the mere terms of the statute. After describing the protection enjoyed by union members as employees under the 8(a)(3) and 8(b)(2) restrictions as previously described, the Court noted (356 U. S. at 320):

> But the protection of union members *in their rights as members* from arbitrary conduct by unions and union officers has not been undertaken by federal law, *and indeed the assertion of any such power has been expressly denied.* The proviso to § 8(b)(1) of the Act states that [and here the Court quoted the proviso]. (Emphasis supplied.)

Also pertinent on this score is that the lone respect in which the Act contains an internal union regulation is covered by a specific restriction in a separate section—8(b)(5), which limits the initiation fees which may be charged by a union having a union-security contract. This and the financial reporting provisions of Section 9(f) and (g)—since

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24. *Printz Leather Co.*, 94 NLRB 1312 (1951).

25. *N.L.R.B. v. Electric Auto-Lite Co.*, 196 F.2d 500 (C.A. 6, 1952).

26. *Marlin Rockwell*, 114 NLRB 533, 561 (1955).

repealed—were the sole respects in which the House effort to place the internal union-member relation under federal regulation survived the final enactment. And this bears on the intent as manifested in the legislative history, to which we turn.

(5)

The intention not to interfere with the internal affairs of unions is rather formidably manifested in the legislative history on three fronts: (a) the nonsurvival, previously mentioned, of the House effort to place internal union affairs under the regulation of the statute; (b) the express declaration of the sponsors of 8(b)(1)(A) concerning the limits of its intended prohibition; and (c) the explicit disclaimer of its sponsors that it was intended to interfere with internal union affairs. We discuss each of these in terms of the weight given by the Supreme Court to like factors in *Curtis Bros.*

As to (a), the Supreme Court, in *Curtis Bros.*, gave weight to the fact that the House Bill, unlike the Senate Bill, had a specific provision banning the conduct there involved, and that this failed of ultimate enactment. As stated, the same situation exists in respect to the subject matter at issue here.

The House Bill (HR 3020), in Section 8(c), imposed restrictions on the conduct of unions over members in many respects. These included in subsections (5) and (6), restrictions on the disciplinary powers of fining, expelling or suspending members. LH 180-1.[27] In contrast with the

27. The reference "LH" is to the pages of "The Legislative History of the Labor Management Relations Act, 1947" (GPO 1948). Where the designation "CR" appears, it refers to the pages of Volume 93 of the Congressional Record, which report the debate on the measure, in the 80th Congress. All references to the debate will cite the appropriate pages in each of these volumes.

House Bill, the Senate Bill (S. 1126), did not impose any such restrictions, and in its report explaining the limitations placed in 8(a)(3) and 8(b)(2) of its bill upon union-security contracts, previously described, the Senate Committee reaffirmed the freedom of unions in respect to their control over the membership.[28] In the final enactment, it was the Senate's view that prevailed, for, as mentioned, none of the House provisions survived the final enactment, with the two minor specific exceptions previously noted.

Aspects (b) and (c) can be discussed together. In *Curtis Bros.*, probably the decisive factor to which the Supreme Court gave weight was the one touched upon earlier—the limits of the intended prohibition of 8(b)(1)-(A), as expressed by its sponsors. In connection with it, the Supreme Court in *Curtis*, quoted at some length from the sponsors' statements of purpose. From them it concluded, as previously stated, that 8(b)(1)(A) was intended to prohibit "violence intimidation and reprisal or threats thereof," and by that token not to extend to the conduct there involved.

But the statements of the sponsors of 8(b)(1)(A) afford an even stronger basis for a like conclusion with respect to the conduct involved here. In contrast with their silence concerning the conduct involved in *Curtis*, the sponsors of 8(b)(1)(A) were quite explicit about the subject here at issue. They repeatedly emphasized the irrelevance of the membership relation to the kind of co-

28. The Report stated (LII 427):

> *It is to be observed that unions are free to adopt whatever membership provisions they desire*, but they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against an employee except in the two situations described. [These were ultimately reduced to the single one of tender of dues and initiation fees.] (Emphasis supplied.)

ercion sought to be prohibited by 8(b)(1)(A) and in connection with it, were unequivocal in their assurance that 8(b)(1)(A) was not intended "to interfere with the internal affairs of unions." As previously pointed out, the power of unions to enforce their policies upon members through the control of this gave them over their jobs was effectively curbed by the provisions of 8(a)(3) and 8(b)(2) of the Senate Bill, which drastically limited the grounds on which nonmembership could result in an employee's losing his job under a union-security contract. But the sponsors of 8(b)(1)(A) wanted the employees protected also against coercive tactics other than those which a union can exert through its power over members. These were, as they stated, threats of violence and economic reprisals of the kind unions were known to use upon nonmembers in order to force them to join up. Their object, as they repeatedly put it, was to balance the protection which the Wagner Act gave employees against coercive tactics by employers to force them to abstain from membership, with corresponding protection against coercive tactics by unions to force them to become members. The tenor of the sponsors' statements of purpose was summed up by the Supreme Court in *Curtis Bros.*, as follows:

> The note repeatedly sounded is as to the necessity for protecting individual workers from union *organizing* tactics tinged with violence, duress or reprisal. (Emphasis supplied.)

The opinion in *Curtis Bros.*, refers to and quotes from the "Supplemental Views" to the Committee Report, as filed by five Senators, headed by Senators Taft and Ball. In it they indicated they would introduce 8(b)(1)(A) and stated their purpose to be to protect employees from union tactics, such as "threats of reprisal against the employees

in the course of organizing campaigns;[29] also direct interference by mass picketing and other violence."

The irrelevance of the power of unions over members to the kind of coercion sought to be outlawed by 8(b)-(1)(A) was again stressed by Senators Ball and Taft on April 25, the day the section was introduced without the proviso, and was repeated by them throughout the week's debate over the measure until its adoption on May 2. In introducing 8(b)(1)(A), Senator Ball explained that its purpose was "to provide that where unions, *in their organizational campaigns,* indulge in practices [which were an unfair labor practice if engaged in by employers] the unions shall be guilty of unfair labor practices" (LH 1018; CR 4176); and Senator Taft stated that "the men who are coerced *may not have anything to do with the union at all. . . . Sometimes the union has not even gotten into the plant,* when they *begin to coerce employees of the plant* (LH 1030; CR 4144).

The coercive tactics which they consistently cited as the target of 8(b)(1)(A) were of the kind recited in the "Supplemental Views" previously referred to, and which as they stated there and on the Senate floor, unions were known to use in organizing campaigns. Throughout the week's debate, the instances cited covered the following: (a) threats to beat up an employee or his family,[30] (b) threat of economic reprisal upon nonmembers through the control over jobs they would achieve after becoming organized and getting a contract, such as causing the employee to be discharged by denying him membership[31] or

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29. All emphasis is supplied unless otherwise indicated.

30. Ball: at LH 1018 (CR 4136), LH 1021 (CR 4139); Taft: at LH 1205-6 (CR 4142).

31. Taft: at LH 1025 (CR 4142); LH 1029 (CR 4144); LH 1205-6 (CR 4562); Ball: at LH 1203 (CR 4560).

having him pay a steeper initiation fee in order to keep his job;[32] and (c) mass picketing.[33]

Added to the sponsor's omission of any allusions to unions internal powers over members in their recital of the kind of coercion sought to be reached by the proposed section were their express declaration that these matters were irrelevant to its purpose and explicit disavowals of any intention to have them interfered with thereunder. By way of background: as previously indicated, the purpose of the bill to leave untouched the control of unions over their memberships had already been pointed out by the Senate Committee in the portion of the Report, explaining the 8(a)(3) and 8(b)(2) strictures on union-security contracts in the bill as it stood (*supra*, n. 28). But the introduction of 8(b)(1)(A) touched off expressions of apprehensions by various Senators that its language could be construed as interfering with the internal affairs of unions; and in disputing this last, Senator Taft, even before the proviso was introduced, stressed that under the scheme of the bill as a whole, unions were left free in respect to their internal affairs.[34]

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32. Taft at LH 1205-6 (CR 4562).

33. Taft: at LH 1205-6 (CR 4562); Ball: at LH 1203.

34. On April 25 in the specific context of discussion of 8(b)(1)(A), he stated (LH 1030; CR 4144):

> Even in this bill we do not tell the unions how they shall vote or *how they shall conduct their affairs* . . .

He repeated it on April 29, this time in the context of a discussion of the strictures of 8(a)(3) and 8(b)(2) on union-security contracts (LH 1097; CR 4318):

> *The pending measure does not propose any limitation with respect to the internal affairs of unions.* They still will be able to fire any members they wish to fire, and they still will be able to try any of their members. All that they will not be able to do, after the enactment of this bill is this: If they fire a member for some reason other than nonpayment of dues they cannot make his employer discharge him from his job and throw him out of work. That is the only result of the provision under discussion.

After the proviso was introduced, Senator Ball twice expressed his approval of it as confirming the intention of the sponsors of 8(b)(1)(A) all along not to have it touch any aspects of the union-member relationship. Upon introduction of the proviso by Senator Holland on April 30, Senator Ball stated (LH 1141; CR 4400):

> Mr. President . . ., I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was *never* the intention of the sponsors of the amendment to interfere with the internal affairs of organization of unions. The amendment of the Senator from Florida makes that perfectly clear.

And, on May 2, the day of the vote on the measure, Senator Ball repeated that disclaimer at the conclusion of his exposition of the type of union tactics sought to be reached. He said (LH 1200; CR 4559):

> That modiifcation [the proviso] is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its effort to organize unorganized employees.

With the scope of the contemplated prohibition of 8(b)(1)(A) as thus explained by the sponsors, it would seem clear, as was the case with the conduct involved in *Curtis Bros.*, that 8(b)(1)(A) had not been intended to reach the conduct here involved, even without the proviso. This is not because an internal union discipline is not coercive, for that is the purpose of all disciplines, but because, as its sponsors indicated, it was not the kind of coercion with which 8(b)(1)(A) was concerned. With the prohibiting clause so understood, the Charging Parties' contention that the proviso is not a limitation on 8(b)(1)-(A) would be correct only in the sense that a nonexistent

prohibition needs no proviso to limit it. But if, contrary to the intention of its own sponsors, 8(b)(1)(A) were to be interpreted to have the broader reach contended for here, then the proviso is a limitation upon it, for a proviso is by its very nature a limitation upon the prohibition to which it is attached. And it would seem rather clear that the proviso, explained by Senator Ball as confirming the intention not to interfere with the "internal affairs of unions" is a generic expression intended to immunize the prescription of union rules upon members and the use of internal discipline in enforcing them, without regard to the content of the rule and without regard to whether the discipline be fines, suspension or expulsion.

Of course, the coercive tactics which unions are forbidden under 8(b)(1)(A) to use in order to force employees to *become* members they are also forbidden to use in order to force employees to fall into line with a given union policy, whether upon members or nonmembers. Just as they may not coerce employees into membership by threats of violence, or economic reprisal affecting their tenure, or mass picketing, so may they also not use these measures to force employees to follow a union rule or policy. Board lore is replete with instances in which unions have been found guilty of violating 8(b)(1)(A) for resorting to enforcing measures which stepped out of the confines of internal disciplines and into the forbidden area as marked out by its sponsors.[35]

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35. Accenting this demarcation is the pair of cases exemplifying a union's immunity under 8(b)(1)(A) in merely *demanding* of an employee payment of membership obligations in excess of dues and initiation fees as limited by 8(a)(3) and 8(b)(2), without threatening discharge (*National Lead*, 106 NLRB 545), and its liability thereunder in threatening to cause the discharge of the employee for not paying the excess, even though adjudged in a State court as validly owing the Union under its bylaws. *Marlin Rockwell*, 114 NLRB 53.

The forbidden coercive conduct is the use of *enforcement measures* which go beyond the unions' power over members as members. It does not lie in the fact that the *rule or policy* sought to be enforced purports to restrict members' conduct in their role as employees, in the form of rules against strikebreaking or work rules. That kind of rule or policy is the implicit premise of the very existence of a labor organization. The collective withholding of their labors is the resource which employees bring to the negotiating table to match the bargaining power of the employer. The group may not demand of the individual that he join them in this collective activity as a condition of his remaining an employee; but the Act leaves untouched the group's requiring that he do so as a condition of his remaining one of their members, and if as part of the compact, he has submitted to certain internal disciplines in effectuation of this requirement, that too is left untouched by the Act, and is a subject of the contract law of the State.

So it is not the rule but the *method* of enforcing it that controls. The rule expresses an *end*, not a *means*, and as the Board put it in an early case cited by the Supreme Court in *Curtis Bros.* to exemplify the correct interpretation—"in that section [8(b)(1)(A)], Congress was aiming at *means*, not *ends*." *Perry Norvell*, 80 NLRB 225, 238-9 (1948).

Proponents have pointed to nothing in the legislative history which supports their position that the coercion can inhere in the *rule* which is sought to be enforced as opposed only to the *method* of enforcing it or any other requirement of a union. They have cited an extract from a long statement by Senator Taft, at the conclusion of the debate over the measure, in which he recapitulated the coercive organizational measures sought to be outlawed

by 8(b)(1)(A). The extract as quoted and as isolated from its context, reads (LH 1206; CR 4562):

> The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them; you can put up signs, you can conduct any form of propaganda you want in order to persuade them, but you cannot, by threat of force or threat of economic reprisal prevent them from exercising their right to work."

Omitted by proponents is the portion of the statement immediately preceding the extract, which gives it its meaning. Senator Taft, at the request of Senator Saltonstall, had been citing the kind of coercion sought to be outlawed by 8(b)(1)(A). He mentioned the tactics previously summarized, and the quoted extract came after he mentioned the tactic of mass picketing, his point being that when a union resorts to that kind of tactic, "the effect of the amendment" is the one set forth in the quoted extract. The Senator's immediately preceding description of that tactic shows that that was what the "right to work" expression had reference to, thus (LH 1205; CR 4562):

> Let us take the case of *mass picketing, which absolutely prevents all the office force from going into the office of a plant. That would be a restraint and coercion against those employees, an interference with their rights to work.* . . .
>
> . . . In some small plant in which *the labor (sic) is not* organized, a man comes and says, "I represent the employees. . . ." In any event, they do not reach an agreement, and the man immediately calls a strike, he pickets the plant, *he keeps out the employees.*

> When the employer goes to the Board, the Board says, ". . . We have nothing to do with that under the Act."
>
> The effect of the pending amendment is that the Board may call the union before them (etc.).

The suggestion of the proponents that although expulsion may be a permissible form of discipline under the proviso, a fine is not, is inherently contradictory. The same literal construction which would exclude a fine from the proviso because Webster's does not include a fine in its definition of "rules with respect to the acquisition or retention of membership" would have to exclude expulsion as well, because it is not embraced within the literal scope of the term "prescribe." If the right to "prescribe" implicitly embraces the right to enforce, as it does, then there can be no valid distinction based on the kind of internal enforcement measure used. The portions of the House Bill purporting to regulate unions' disciplinary powers indicate that Congress was well aware, as Professor Clyde Summers has put it in his study of long-existing trade union practices in that field,[35a] that "the three common types of penalties for offenses are fines, suspension for a limited period, and expulsion," and "the most common form of penalty is a fine." Indeed, long before the enactment of Taft-Hartley, the Federal judiciary had recognized the disciplines of "fine, suspension, or expulsion for an infraction of union rules" as valid aspects of a "purely voluntary" relation of "membership in the union."[36]

Highlighting the anomaly here of any contention that Congress took a more baleful view of a fine than it did

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35a. Summers, *Disciplinary Powers of Unions*, 4 Ind. & Lab. Rel. Rev. 15, 26 (1950).

36. *Barker Painting Co.* v. *Bro. of Painters*, 23 F.2d 742 (C.A. D.C., 1927).

of expulsion, is that the nonsurviving provisions of the House Bill paced more stringent restrictions on the substantive grounds for the penalty of expulsion than that of a fine. The only restrictions on the substantive grounds for a fine were those set forth in 8(c)(5) of the Bill forbidding its use as a penalty for member's exercising basic civil rights, such as freedom of speech, assembly, and exercise of the voting privilege, of the kind embodied in the "Bill of Rights" portions of the LMRDA, enacted by Congress 12 years later (*supra*, n. 18). The restrictions on the substantive grounds for expulsion, under 8(c)(6) of the House Bill were considerably greater. But neither of these provisions made it impermissible for a union to discipline a member for infraction of a work rule of the kind involved here or in *Minneapolis Star*. To accept the proponents' interpretation of 8(b)(1)(A) is thus to conclude that despite the express disavowals by its Senate sponsors of any intention to interfere with the internal affairs of unions, and despite their counsels having prevailed over that of the House so as to strike down all provisions contrary to such disavowals, the result of the ultimate enactment was to impose more stringent restrictions on union disciplines than even those embraced in the rejected House measure.

Further significantly bearing upon the subject is the action taken by Congress after the enactment of the Taft-Hartley Law. This has two relevant aspects: first is its action, under Title I, the "Bill of Rights" portion of the LMRDA of 1959, in enacting for the first time some Federal protections for the rights of union members as members; second was its action, in the course of amending our Act under Title VI of the same law, in leaving untouched the interpretation of the proviso under the controlling doctrine which is here challenged.

Concerning the first: as stated before, no one had disputed the correctness of the Board's consistent interpretation, upheld by the Seventh Circuit in *ANPA; supra* n. 6, and reaffirmed by the Supreme Court in Gonzalez, that the Act gave no protection to members against union conduct *as members.* As two noted commentators put it, "the statute protects employment rather than union membership."[37] Because of this and the inadequacies of the protection given by some States to union members as members, there was strong agitation that Congress enact protections for members against arbitrary exercise of union power. The abuses were not thought to inhere in the substantive grounds for discipline exemplified by the kind of rule involved here, or in *Minneapolis Star,* or even *ITU.* They concerned the use of disciplinary powers to penalize the members for exercising the rights of free speech and assembly, of the kind ultimately protected in the Bill of Rights portion of LMRDA, and the absence of procedural safeguards in imposing any discipline, as ultimately guaranteed in the same measure.[38] Yet Congress hesitated to even go that far until its reluctance "to reenter such a hazardous political mine field"[39] was overcome by the "much publicized exposés of the McClellan Committee";[40] and, as observed by the incumbent General

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37. Aaron & Komaroff, *Statutory Legislation of Internal Union Affairs,* 44 Ill. L. R. 425, 446-7 (1951), Sugerman, *The Right of the Individual Employee under the Taft-Hartley Act,* NYU 3rd Conf. on Lab., 357-8 (1950).

38. Aaron & Komaroff, ep. cit., *supra,* n. 37; Summers, *Legal Limitations on Union Discipline,* 64 Harv. L. R. 1049, 1050 (1951). Summers, *The Role of Legislation in Internal Union Affairs,* 10 Lab. L. J. 155-8 (1959); Aaron, *The Labor Management Reporting & Disclosure Act of 1959,* 73 Harv. L. R. 851-2 (1960).

39. Note: *Rights of Union Members: The Developing Law under the LMRDA,* 48 Va. L. R. 78, 79 (1962).

40. *Ibid.,* Holcombe, *Federal Government & Union Democracy,* NYU 13th Ann. Conf. on Lab. 247, 248 (1960). Rothman, *Legislative History of the "Bill of Rights" for Union Members,* 45 Minn. L. R. 199 (1960). Cox, *Law & the National Labor Policy* (1960) 87.

Counsel in an informative article on the legislative history of the "Bill of Rights" portion of the LMRDA, "without the investigations [by the McClellan Committee] it seems extremely doubtful that there could have been compelling pressure in Congress for any type of legislation relating to internal union affairs."[41] Yet even that initial Federal venture into the internal union relationship did not penetrate it with the depth here claimed for 8(b)(1)(A); it enacted due process protections for any member before he "may be *fined, suspended or expelled*" (§ 101(a)(5)), (emphasis supplied); and forbade the use of these disciplines to penalize members for exercising the rights of "freedom of speech and assembly" (§ 101(a)(2)). And the remedy given for these rights was not by recourse to the Board, but by private suit in the district courts (§ 102). As the Supreme Court stated in *Curtis Bros.*, the later action of Congress in specifically legislating upon the type of subject here at issue is relevant in the consideration of a contention which seeks "to extend the reach of the earlier Act's vague language to the limit, which, read literally, the words might permit."

Of even more decisive significance under traditional canons of interpretation, is the second phase of Congress' action in 1959—that dealing with the amendments to our Act embodied in Title VI of the LMRDA. The purpose of these amendments, as frequently stated on the floors of both Houses and in the reports on the legislation, was to plug up "loopholes" in the Taft-Hartley Law, some being thought to result from disputed interpretations of various of its provisions by the Board and the Courts. Although the investigation preceding the enactment of LMRDA went deeply into the union-member relationship, no one, as stated, questioned the interpretation of the proviso, as em-

41. Rothman, *op. cit., supra,* n. 40, at 204.

bodied in the Board's and the Seventh Circuit's decisions in the *ITU* and *ANPA* cases (*supra*, n. 6) and the Board's decision in *Minneapolis Star* (*supra*, n. 7). Nor did Congress. While plugging up "loopholes" in other respects, it did not change the interpretation thus authoritatively given to the proviso, that under it, a union did not violate 8(b)(1)(A) by using its internal disciplinary powers to enforce a rule governing how or when a member may work, whether by expulsion, as in *ITU*, or fine, as in *Minneapolis Star*. Under well-established doctrine, "it is a fair assumption that by [leaving] without pertinent modification the provision with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the Courts." *N.L.R.B.* v. *Gullet Gin Co.*, 340 U.S. 361, 366 (1951).

(7)

We come to *Allen Bradley*. That case, decided by the Seventh Circuit in 1961, involved, as previously stated, not the issue of whether a union had engaged in an unfair labor practice, but whether an employer had done so. The employer had refused to sign any contract with the Union, unless it included an agreement not to fine any member for refusing to participate in a strike. In its own decision[42] the Board, on the ground that the Union's fining power was a part of its internal affairs within the immunity of the 8(b)(1)(A) proviso, held that by *insisting* upon the clause in question the employer had defaulted in its bargaining obligation under Section 8(a)(5), under the doctrine laid down by the Supreme Court in *Borg Warner*.[43]

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42. *Allen Bradley Co.*, 127 NLRB 44 (1960).

43. *N.L.R.B.* v. *Wooster Div. of Borg Warner*, 356 U.S. 342 (1958). There an employer had been held to have unlawfully refused to bargain in insisting on an agreement by the union not to strike except upon authorization by the membership at a meeting duly called for that purpose.

The court in *Allen Bradley* thought the Board's conclusion did not follow from its premise: it deemed *Borg Warner* not to be controlling, because granting the union's fining power to be immune under the proviso, the employer had an interest in the subject, which it could seek to protect by the clause it proposed, the court seeing it as the equivalent of a no-strike proposal, which would have been concededly proper. That, as the court observed, was all it needed to decide. It said:

> This case might well be disposed of on the basis of what we have said.

But although it had this disposed of the issue before it, it nevertheless went on to address itself to the Board's premise in the manner which accounts for this proceeding. It said:

> However, the Board strenuously insists that the Company proposal was not a subject for bargaining because the Union in its coercive activities was protected under the proviso in Sec. 8(b)(1)(A), which authorizes the Union to prescribe its own rules "with respect to the acquisition or retention of membership therein." True, the fines which the Union had previously imposed and about which the Company was concerned were authorized by Union rule. Even so, there is nothing in the situation before us which indicates that such fines bore any relation to the "acquisition or retention of membership." The Board evidently recognizes this because it argues, "imposition of the fine is merely a step in determining membership status; non-payment leads to expulsion." We assume that a union had broad powers in prescribing rules relative to the acquisition and retention of its members. *However, that power, in our view, is not absolute. It goes beyond any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act. Coercive action, whether by way of fine, discharge or otherwise, which deprives a member of*

> *his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union.* (Emphasis added.)

The component elements of the foregoing statement have already been treated in our discussion of the proponents' argument, which adopts them. Thus, as we have seen, the discipline of a fine is no less a part of a union's internal affairs than that of expulsion; and, as earlier mentioned, the same court, 10 years earlier in *ANPA* (*supra*, n. 6), had held the discipline of expulsion to be immune on the premise that "the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their membership as they see fit."

The statement that a union "goes beyond any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act" overlooks the distinction, stressed by the Supreme Court in the *Gonzalez case* (*supra*, n. 15), between a member's rights *as an employee*, which the Act protects, and his rights *as a member*, which it does not. Under that distinction, what controls is not the nature of the rule for which the sanction is imposed, but the nature of the sanction. If the sanction reaches into the member's status as employee, as a discharge would do, the Union, for reasons already explicated, has stepped outside the immunized preserve of internal affairs and is liable under the Act; on the other hand, if the sanction is limited to the exercise of the union's disciplinary powers, whether in the form of expulsion, suspension, or fine, it has stayed within it, and is immune under the 8(b)(1)(A) proviso.

Also, as previously pointed out, if a sanction were to be held to lose its immunity as an internal affair because of the substantive requirement of the rule which it enforces, a different result would have had to be reached by the

Court in *ANPA*, for there the threatened expulsion was "a sanction upon a member because of his exercise of a right guaranteed by the Act" and in enforcement of a rule affecting the members "right to work" in a much more drastic manner. In contrast with *Allen Bradley*, where the discipline enforced a rule requiring observance of an ordinary, economic strike, the one in *ANPA* enforced a requirement upon members to abet the union in strikes for closed shop conditions, for engaging in which the Board held the union itself to have violated § 8(b)(2) of the Act.

One would hardly understand that the *Allen Bradley* dictum was intended to overrule the holding in *ANPA*, since if that had been the intention, the dictum would presumably have said so and mentioned *ANPA*. The holding in *ANPA* being thus still controlling, the premise on which the court there held the sanction of expulsion to be immune under the proviso would, were the matter squarely presented for decision, call for the same result in respect to a fine. More particularly so in that for the interpretation it gave the proviso in *ANPA*, the court expressly relied on the legislative history, while the dictum in *Allen Bradley* makes no such claim. Lending added support to this conclusion is the previously mentioned presumption that Congress approved the interpretation given the proviso in the *ANPA* and *Minneapolis Star* cases by leaving that interpretation untouched at the same time that it acted to plug up "loopholes" in the Act under the amendments thereto enacted in 1959.

(8)

The court's statement that a union's "power [in respect to its own rules] is not absolute" touches upon a previously discussed matter, but in a slightly varying posture. Congress, to the extent already described, has specifically charted out the restrictions it has seen fit to impose upon

the power under Federal law. All else remains outside the Federal domain, and subject to State policy, as these matters are until Congress acts to bring them within the Federal purview.[45]

The point above may well have been blurred in *Allen Bradley* by the background of State court litigation described by the Seventh Circuit in its opinion, which explains the reference in its dictum to "the fines which the union had previously imposed." As recited in the opinion, during an earlier strike against the employer in question, the union had assessed fines upon members for disregarding the rule against strikebreaking and sued in the Wisconsin courts to collect them. The penalized members then filed charges with the Regional Office of the Board accusing the union of violating Section 8(b)(1)(A), and the General Counsel in Opinion F-198, dated October 28, 1957, refused to issue a complaint on the ground that the conduct of the union was immune under the proviso of 8(b)(1)(A). They then filed charges with the Wisconsin Employment Relations Board (WERB) charging the union with unfair labor practices under a provision of the Wisconsin Employment Peace Act (Ch. 111 Wis. Stats.) comparable to our 8(b)(1)(A) without the proviso. The story from then on is recited in the decisions of the Wisconsin Supreme Court in *Wisconsin Board* v. *Lodge 78 IAM*, 46 LRRM 3062 and the companion case of *Local 248 UAW* v. *Wisconsin Board*, 46 LRRM 3058, both decided October 4, 1960.

The WERB found that the union's action in assessing and threatening to assess fines on members for crossing picket lines coerced them under a provision of the Wisconsin Employment Peace Act comparable, as previously

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45. *Allen Bradley Local* 1111 v. *WERB*, 315 U.S. 740 (1942); *U. A. W.* v. *WERB*, 336 U.S. 454 (1949).

stated, to our 8(b)(1)(A) minus the proviso, and issued a cease and desist order. After affirmance of the order by a lower Wisconsin court, the matter came up on appeal to its Supreme Court. That Court, although expressly reaffirming its earlier holding in *Woychik* (*supra*, n. 14) that fines imposed by a union for violation of a rule against strikebreaking are validly collectible as debts under the "contract of membership," reversed its lower court and the WERB—but not on the merits. It did so only on the ground of Federal preemption.

The Supreme Court of Wisconsin based its conclusion of Federal preemption on an interpretation of the Board's decisions in *ITU, Minneapolis Star*, and also in *Allen Bradley* (before the Seventh Circuit's review) as more than a holding that a union's disciplinary powers in enforcement of a rule against strikebreaking were merely immune under the proviso of 8(b)(1)(A): the court viewed them as declarations by the Board that the disciplinary union action in those cases was affirmatively "protected" thereunder, and hence had the effect excluding the State from any jurisdiction in respect to them. It expressed the opinion that the construction it was thus attributing to the Board's decisions was "certainly a permissible one" because of the "intimate connection," as the court saw it, between the power of a union "to enforce solidarity among its members [during a strike]" and its being an "effective instrument of collective bargaining," as protected by Section 7 of the National Act. Hence, the Wisconsin Court concluded that the field was federally preempted under the Supreme Court's doctrine in the *Garmon* case.[46] to the effect that there is Federal preemption even where the activity is "arguably within the compass of sec. 7 or 8 of the [National] Act."

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46. *San Diego Council* v. *Garmon*, 359 U.S. 236 (1959).

The manner in which the Board's decision in *Allen Bradley* influenced the State court toward that conclusion, highlights still another distinction between *Allen Bradley* and a case such as this, or *ITU* and *Minneapolis Star*. Here, as in *ITU* and *Minneapolis Star*, the issue of whether a union has violated 8(b)(1)(A) is squarely presented. In contrast with these, in *Allen Bradley*, the Board merely considered the matter in connection with whether an employer had violated its bargaining obligation by insisting upon a clause which purported to give it control over unions' internal disciplinary powers. This aspect of *Allen Bradley* led the Wisconsin court to misinterpret the intent of the Board's decisions in *ITU* and *Minneapolis Star*, and, it would appear, led both it and the Seventh Circuit to believe that the Board, in *Allen Bradley* at least, had equated immunity under the 8(b)(1)(A) proviso with affirmative protection. The aspect of the Board's action which tended to create that impression was its holding to the effect that the clause proffered by the employer in *Allen Bradley* was offensive on the same ground as the one in *Borg Warner*. But in *Borg Warner* (*supra*, n. 43) the offending clause purported to control the manner in which a union could call a strike. This last encroached upon a field excluded from employer invasion under the rights which union members enjoyed *as employees* under the *protections of Section 7*. Insofar as the Board found the clause in *Allen Bradley* offensive on the same basis as in *Borg Warner*, it conveyed the impression, however, unwittingly, that it deemed the immunity under the 8(b)(1)(A) proviso to be equivalent to an affirmative protection. The Wisconsin court so stated. It first quoted the portion of the Board's opinion in *Allen Bradley*, which, after stressing the immunity given unions' disciplinary powers under the 8(b)(1)(A) proviso, the Board said:

> By thus intruding on *rights guaranteed* to Unions by the Act, Respondent's proposed clauses fell outside the scope of mandatory bargaining. (Emphasis the Court's.)

The Wisconsin court then concluded:

> The foregoing quotations from decisions of the National Labor Relations Board make it abundantly clear that such Board interprets the proviso as having the effect of making the enforcement by a union of its own constitution and bylaws a protected activity under the Labor Management Relation Act.

The Seventh Circuit would appear similarly have construed the Board's position, since, as can be observed in the opening sentence of the *Allen Bradley* dictum, it introduced the discussion as one dealing with a contention that the union's activity was "protected by the proviso of Sec. 8(b)(1)(A)."

Of course, the Board never intended by its decisions in *ITU* and *Minneapolis Star* to suggest that the disciplinary action in enforcement of the rules there involved were affirmatively protected under the Act, as opposed to merely being not violations thereof. Whatever basis the Wisconsin Court had for any such impression because of the presumably protected character of the strikes in *Minneapolis Star* and *Allen Bradley,* in aid of which the fines were imposed, it is difficult to see how the immunity ascribed under the 8(b)(1)(A) proviso to the discipline invoked by the union in *ITU* could be construed as a declaration that such activity had the affirmative protection of the very statute they were intended to help flout, and which the Board held to have in fact been flouted by the strike activity itself.

The *ITU* decision could not have been more clearly calculated to exemplify the intention of Congress, under the proviso, to chart out an area not of affirmative protec-

tion, but, as the Supreme Court described it in *Gonzalez*, one over which Congress "expressly denied" the assertion of power. This left a Federally unentered enclave, "neither forbidden by the Federal statute, nor . . . legalized and approved thereby" (*UAW* v. *WERB, supra,* n. 45, at 265), and, hence subject to State regulation, since "Congress has not made such . . . union conduct . . . subject to regulation by the Federal Board." *Allen Bradley Local 1111* v. *WERB, supra,* n. 45, at 749.

The intention of Congress to stay out of that field is too manifest, it would seem to me, to permit of an "arguable" interpretation of the 8(b)(1)(A) proviso as defining an area of *protection* rather than one of *Federal abstention.* Any other contention I would suggest, misconceived the manifest purpose of the 1947 statute. Its purpose was not to enact more protections for labor unions but for the first time in our industrial history, to subject their activities to Federal restriction. The proviso was not the outcome of any effort to declare an affirmative protection but to make "perfectly clear," in Senator Ball's words, the intended limits of a proposed *restriction* on union conduct. The limits, as conceived by the managers of the Senate Bill, whose counsel prevailed over the House, were embraced in the sharp line of demarcation between the rights of members *as employees* and those as *members, i.e.,* between union's conduct outside its membership confines, which the Act undertook to regulate, and those within it, which Congress chose to stay out of. This sharp line was drawn from the very outset in the Committee Report on the Bill explaining the restriction upon enforceability of union security contracts, previously quoted (*supra,* n. 28). The same purpose, as also previously indicated, was confirmed by the assurances of the sponsors of 8(b)(1)(A) concerning its intended limits without the proviso, and their agreement to the proviso as confirming those limits. The Senators, in

response to whose apprehensions concerning the reach of 8(b)(1)(A) the sponsors gave these assurances, did not base their concern over 8(b)(1)(A) on the possible impairment of any preexisting Federal protection of unions' disciplinary powers. There is no indication that it occurred to anyone that such protection existed. They were concerned about its having the effect of outlawing conduct which was assumed never to have been reached by the Federal statute and which they feared might be interpreted as being placed under Federal regulation by 8(b)(1)(A). The assurances of the sponsors to the contrary were based on the intent of the Bill as a whole not to reach into unions' internal disciplinary powers and of the intent of 8(b)(1)(A) to bar coercive tactics to which such powers were irrelevant, a matter which the proviso was intended to make "perfectly clear." And, as stated, the Congressional intention not to enter the union-member relationship under our Act is manifested further by the fact, that its later limited entry into that field under the Bill of Rights of 1959 was accomplished by legislation specifically directed toward that end, specifically stating its scope, and specifically naming the authority (other than the Board) empowered to police the protections thus enacted.

It would seem clear therefore, that those aspects of the union-member relation which had not been specifically placed within the Federal purview remained, as they always had been, subject to State law or policy.[47]

The Wisconsin Court saw in its State board's interpretation of the Wisconsin Act the kind of encroachment upon

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47. See Cox, *The Role of Law in Preserving Union Democracy*, appearing as a chapter in Harrington & Jacobs, *Labor in a Free Society* (U. of Cal. 1959), pp. 54-55; Note: *Trade Unions Members Rights in connection with Disciplinary Proceedings*, 33 Minn. L. R. 156, 162 (1959).

a union's traditional disciplinary powers which would impede its capacity to perform a function of the very kind which the preamble of the Federal Act approvingly envisaged for unions. It is inconceivable, however, that the proviso had any purpose of shielding that power against State encroachment, envisioned by either the sponsors of 8(b)(1)(A) or the sponsors of the proviso. The latter manifestly sought to leave unions' disciplinary powers exactly where they had been assumed to be all along—subject to State authority, where the body of law as developed in that area was one which, shall we say, unions found it not too hard to live with.[48] At any rate, they could hardly have felt the need for Federal "protection" against a body of State law, under which, as Professor Summers describes it, "in upholding discipline for violation of [union work] rules, the courts imply that the rules are within the permissible limits of union power" (*supra*, n. 48, *op. cit.* at 1064). The sponsors of the proviso acted to obviate the peril, as they voiced it, to that kind of freedom which they apprehended in 8(b)(1)(A) as it stood without the proviso, and the sponsors of 8(b)(1)(A), in approving the proviso, indicated that it merely confirmed their intention from the start not to make any Federal inroads upon it—but hardly to give it Federal protection either.

The various factors alluded to by the Wisconsin Court in discussing the effects of its board's decision upon a union's capacity to perform its traditional function as a labor organization are indeed germane to the second issue before it and which it held it did not reach—namely, whether the State board had correctly interpreted the Wisconsin statute under a provision comparable to our

48. Note: *Trade Unions' Members Right in connection with disciplinary Proceedings*, 33 Minn. L. R. 156 (1959). Summers, *Legal Limitations Union Discipline*, 64 Harv. L. Rev. 1049 (1951).

8(b) (1) (A) minus the proviso, in the light of State policy, embodied in such decisions as *Woychick* (*supra*, n. 14), which holds a fine assessed on a member in enforcement of a rule against strikebreaking to be a valid debt under the "contract of membership." And insofar as the Wisconsin Court deems the policy of another jurisdiction affected in someway by the result, whether it be that of the Federal jurisdiction or of a sister State, that would be germane to its own determination of whether to apply its contract law in comity with the affected policy of the other jurisdiction. However, this involves not preemption but comity—the accommodation which the courts of a given jurisdiction, in applying *their own law*, see fit to make to the interest or policy of another jurisdiction thereby affected.[49]

By way of example, we may assume that in passing upon the validity of the substantive ground, under State policy, for a given union discipline, a court could well take a different view of the kind of rule involved in *ITU*, from that in *Minneapolis Star* or *Allen Bradley*. And to cite a most extreme example for the purpose only of illustrating the point, we may assume that a State court would take one view of a rule forbidding a member to try to bribe a Federal official and another of one requiring him to do so. And in striking the latter rule down, the State court could hardly be accused of encroaching upon the Federal domain: it would in such an instance, be applying its own law with due regard for the manner in which the policy of another jurisdiction is affected by the rule in question and the inherent offensiveness of the rule. Like factors would enter into its consideration of a union rule dealing with equivalent activity on the part of any member toward an official of a sister State.

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49. See 11 American Jurisprudence (1937), *"Conflict of Laws"*, §§ 116 *et seq.*, at pp. 397 *et seq.*

In sum, nothing in the proviso of 8(b)(1)(A) is intended to extend to a union's disciplines, which have been immunized thereunder, the protection which the Act accords to the activity which the measure in question is designed to promote—such as a protected strike, as *Minneapolis Star*; and in like vein, nothing in it is intended to attach to the discipline the illegality of the activity thereby intended to be abetted, such as an illegal strike, as in *ITU*. The sole test of the immunity is not what the discipline is *for*, but what it *is*. If the discipline is internal union discipline, the immunity is complete, regardless of what it is for. If it is external and reaches out to the members' tenure as employee or to his person, the immunity is lost, again without regard to what it is for. And in granting that immunity, Congress intended to and did chart out an area neither protected by Federal statute nor embraced within its prohibitions. By that token, that area remains subject to State law, until such time as Congress specifically acts to place it or any part thereof under Federal regulation. And, by way of final observation in any event: whether or not the Wisconsin Court was right in viewing these disciplines as affirmatively protected by the Federal statute, one can hardly challenge the correctness of its underlying assumption, expressly stated in its opinion, that at the very least they were not illegal under a statute, which in that court's view went so far as even to lend itself to "certainly a permissible" interpretation of being protected thereunder. At any rate, whether the discipline here involved is so illegal is the only issue before us, and for the reasons stated, I find it is not.

(9)

This concludes the case insofar as it involves the issue raised by both proponent in common—*i.e.*, insofar as they have requested a reexamination, which has here been made,

of the doctrine of *Minneapolis Star*, in the light of the *Allen Bradley* dictum. The conclusion that the immunity of the proviso, in the light of its manifest intent, applies to all internally exerted sanctions, whether in the form of fines, suspension, or expulsion, without regard to the content of the rule thereby enforced, disposes of the basis on which counsel for the Charging Parties, at least, has urged a result different from that reached in *Minneapolis Star*.

Government counsel go farther. Their position proposes a broader concept of our policing power over union rules than anything suggested in the *Allen Bradley* dictum —one which would mean rejecting not only *Minneapolis Star*, but *ITU* as well, and even then on a more expanded basis. Under their concept, the discipline would fail of immunity unless in enforcement of a rule, which is "reasonable." The proposition, as stated, is that "a union rule, even if related to the 'acquisition' or 'retention' of membership, must be 'reasonable' to be sanctioned;" and they urge that this test would be no innovation, but one already "indicated" by two court cases of pre-*Allen Bradley* vintage. Perhaps the cases thus cited had best be left with the observation that they do not so indicate. I have in fact, included them among the cases cited in footnote 23, *supra*, as illustrative of a forbidden method of enforcing a rule—that of discharge.[50]

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50. They are *Brotherhood of Painters*, and *Local 1423 Carpenters*. The court, in each instance, preceded the condemnation of the discharge there resorted in enforcement of a union's job rotation rule with the expression "although the union may prescribe reasonable rules for membership and its retention. . . ." It is the adjective preceding "rules" on which counsel build their proposition. No such issue was before the court and there is no explanation of the term. In total context, it would seem manifest the court was assuming the reasonableness of the rule to refute the union's attempted reverse application of the proposition advocated by Government counsel here—a

But in point here are the implications of that test in the light of counsel's proposed application of it. Counsel urge that the rule here involved fails to meet their proposed standard in that "Respondent has not shown it has that legitimate interest in the area of production ceiling which would balance the restraint and coercion it has inflicted on members."

This cuts a wide swath. First of all, the record, as appears in the factual recital, rather plainly indicates that the ceiling rule, as administered at the Employer's establishment, apart from serving as a yardstick in management's

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contention that the reasonableness of the rule would justify the measure used to enforce it.

Apart from the above, Government counsel urge that the Board had already turned its back on the *Minneapolis Star* doctrine in two subsequent cases. But since these cases preceded the Board's decision in *Allen Bradley,* where the Board's reaffirmation of the doctrine is the subject of the very court dictum on which this whole case turns, the doctrine would seem to have had a rapid return to grace. Needless to say, the cases cited do not support counsel's view. The first case, *Local 1400 (Pardee Constr.)*, 115 NLRB 126 (1956), involved coercion not upon members, but on nonmembers in the form of money exaction for a needed work card in the area, which members were not required to pay. The other, *Columbus Show Case,* 111 NLRB 206 (1955), was an 8(b)(2) discharge of employees for getting jobs without observing the union's job rotation rule. The Board's 8(b)(2) order in that case was enforced by the court in *Local 1423*, one of the two court cases mentioned at the start of this footnote. The Trial Examiner there had also found the union to have violated 8(b)(1)(A) in threatening the employees with such discharge and wtih a fine if they did not observe the rule, and the Board dismissed the finding because the complaint alleged no independent 8(b)(1)(A) violations. Counsel construe the Board's procedural dismissal of the finding as tacit approval of its content. On that theory, the refusal of a tribunal to pass upon an issue because not procedurally before it achieves stature as a decision on the merits—either way, depending on who is making the claim.

passing on grievances concerned with job allowances, plays an important role in negotiations concerned with setting the minimum hourly rate, and is also the standard employed in management's "factoring" the hourly rate raises into the piece rate. Thus, in terms of a union's traditional function of trying to serve the economic interests of the group as a whole, the Union has a very real, immediate and direct interest in it.

As to the qualifying adjective, "legitimate," I would presume it is not used in the sense of "legal," since concededly Congress has not outlawed the practice of production ceilings, as, in a very limited way, it did, under Section 8 (b) (6), in respect to featherbedding. If the term is intended to connote a reasonable relation to a Union's traditional economic objective, the authorities on the subject, in treatises from which pertinent extracts have been reproduced in Appendix B of this report, inform us that the setting of production limits among pieceworkers is hardly new in our industrial life, and that it has its roots in experience under piecework and incentive plans giving rise to apprehensions, reasonably grounded, with which such a practice is designed to cope. The practice may or may not be based on theories which all economists would endorse as having current validity, but I wonder whether that is our concern, rather than that of the legislature. And that brings us to the conception of our power, which is embraced in Government counsel's peroration, as follows:

> There is another great issue in this case. The waste of machinery and men which results from Respondent's rule prohibiting members from working is staggering. The amount of employee idleness resulting from the ceiling is not something the men themselves can endure, let alone the nation or the Company. Certainly the Board is empowered to act against union arbitrariness which can lead to disaster

for employees, companies, and a whole economy. The unfavorable effect of a rule limiting production and preventing employees from exercising their right to work does not stop with an individual employee, although that would be sufficient to find a violation in this case. It spreads to whole blocs of employees, to industries, and to our nation itself. The adverse economic consequences of Respondent's rule are enormous.[8] The Board is not powerless to prevent them.

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8. It is respectfully requested that the Trial Examiner reconsider his ruling excluding expert testimony concerning the adverse economic effects of production ceilings, and receive General Counsel's offer of proof on this subject.

Apart from whether the above can be said to embody a balanced appraisal of the record, I must confess to an inability to fathom the basis for the assumption that if the aversion above expressed should rub off on me or the Board, it would acquire the stature of law. I had not thought that "certainly the Board is empowered to act against" union or employer practices on the strength of its particular views concerning their economic desirability, or that any agency ever was so empowered, if it constitutionally could be. I had always supposed that the governmental body vested with the function of appraising and acting upon such a matter was Congress. There, if I may suggest, is the proper forum for counsel's expert.

The subject of the expert's proffered testimony, as I indicated at the hearing in excluding it, is germane to a legislative inquiry concerned with recommendations for future legislation, not to an adjudicative hearing concerned with whether an existing law has been violated.

The acknowledged authority on the general subject has put it in a manner which applies with even greater force to a quasi-judicial agency. He states:

> The judiciary should not prescribe limitations on the economic policies of unions—such limitations must be debated in the political arena and determined through the legislative process. Summers, *op. cit., supra,* n. 48, at 1073.

Underscoring the irrelevance of the social appraisal of a given practice to an adjudicative proceeding is the fact that even after a committee of Congress has heard all viewpoints on a given matter and concluded that a practice is undesirable, between the conclusion and the enactment there is a long and uncertain path. In point is featherbedding, to which I have alluded. In contrast with the practice here involved, of which I have found no mention in the record of the extended hearings in 1947 preceding the drafting of the bills, Congress heard a good deal of testimony on featherbedding.[51] Yet in contrast with the House Bill, which contained a pervasive prohibition of the practice (LH 205), the ultimate enactment in 8(b)(6), as mentioned, prohibited it on the most limited basis.[52] Senator Taft, in a statement which is quoted by the Supreme Court in its opinion in *ANPA* (*supra,* n. 52) upholding the Board's conclusion that 8(b)(6) did not forbid the particular kind of featherbedding there involved, explained that "the Senate conferees . . . *while not approving of featherbedding practices,*" narrowed the prohibition because of the difficulty in articulating a standard, which would be specific enough in its application.

Exemplifying this aspect of legislative caution still further is the limited extent to which Congress acted in 1947 upon a prime target of the legislation, secondary boycotts. Here too, as the Supreme Court noted in *Local 1976*

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51. House Hearings, 80th Cong. 1947, Vols. 1-6 (GOP 1947).

52. See *ANPA* v. *N.L.R.B.*, 345 U.S. 100; *Gamble Enterprises* v. *N.L.R.B.*, 345 U.S. 117.

Carpenters v. N.L.R.B., 357 U.S. 93, the legislation was not commensurate with the Congressional aversion to the practice. It limited the prohibition solely to a union's inducement of the employees of a neutral employer to strike in order to force him to engage in such a boycott—and it enlarged the prohibition 12 years later after a plenitude of enlightening experience under the earlier legislation, yet still short of doing so to the hilt. We might conclude this aspect of our discussion by noting the applicability to our situation of the Supreme Court's observation concerning the conduct in that case, as follows:

> . . . The Taft-Hartley Act was to a marked degree the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when from the words of the statute itself, it is clear that those interested in such a condemnation were unable to secure its embodiment in enacted law.

Rendering the above all the more pertinent to the situation before us are the explicit disavowals by the sponsors of 8(b)(1)(A), previously discussed, of their being at all "interested in . . . a condemnation" of the very matter which it is here contended had been outlawed thereunder.

(10)

To Recapitulate:

(a) The prohibiting clause of 8(a)(1)(A), even without the proviso, was not intended and does not apply to the kind of coercion which results from the application

of internal discipline of unions upon members in enforcement of their rules.

(b) Even if 8(b)(1)(A) without the proviso were to be otherwise construed as applying to that kind of coercion, the proviso of 8(b)(1)(A), in accordance with the explanation of its purpose by the sponsors, precludes such a construction.'

(c) The immunity of the proviso of 8(b)(1)(A) extends to all internal union affairs. This embraces the prescribing of rules by unions with respect to the acquisition and retention of membership and the employment of their internal disciplinary powers to enforce them, with no distinction as between expulsion, suspension, or fine.

(d) The immunity of the disciplinary action under the proviso is not dependent upon the substantive content of the rule which it enforces.

(e) The immunity thus conferred by the proviso was not intended to and does not bestow upon the action in question any affirmative protections of the Act, it merely confirms, in accordance with the intended scope of the section without the proviso, that internal union affairs do not fall within its prohibitions.

(f) Whether the fines imposed by the Union here are validly collectible as debts is controlled by the law and policy of the State.

From all of the above, and the entire record, we derive the following:

Conclusion of Law

The Union did not violate Section 8(b)(1)(A) in assessing the fines in question, or in bringing suit in the State court to collect them.

RECOMMENDATION

Upon the basis of all the above and the entire record, it is hereby recommended that the complaint herein be dismissed.

Nothing herein is intended to control or affect any issue in the State court litigation concerning the validity of either the fine or ceiling rule under the bylaws and constitution of the Union or under such law or policy of the State as its courts might deem applicable thereto.

Dated at Washington, D. C.

A. Norman Somers
Trial Examiner.

APPENDIX A

The relevant provisions of the National Labor Relations Act of 1935 (49 Stat. 449) as amended by the Labor Management Relations Act of 1947 (61 Stat. 136) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8(a). It shall be an unfair labor practice for an *employer*—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . . Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a *labor organization* or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

APPENDIX B

Bibliography on Restriction of Output among Piece or Incentive Workers

Millis & Montgomery, *Economics of Labor* (*Organized Labor*) (1945);

At p. 399:

Naturally, and related to the matter just discussed, piece rates have been closely associated with speeding, to which workers, whether unorganized or organized, object. The objection becomes all the stronger when management points to and uses the earnings of the fastest workers to justify its position that wages or piece rates should not be increased or that they should be reduced. And associated with faster work or speeding is the greater risk of work injury and overstrain, which compositors and others formerly emphasized in their struggles to secure "straight time"; health and earning capacity must be conserved.

At p. 462:

A considerable part of the restriction of output by American unions has been a product of the fixing and administration of piece rates. The employers, as we have seen, may insist on cutting piece rates when they yield earnings regarded as too high as tested by a daily wage, even, possibly, when the high earnings are due to the unusual application or efficiency of the workers engaged on the process. . . . Years ago in the steel industry there were union rules limiting the

output of certain piece workers. The chief object was to protect against rate cutting. For the same reason, it was said, the Stovemounters Union of Detroit at one time forbade its members to earn more than $4.50 per day. It was only after the Stove Founders' National Defense Association agreed that the earnings of a molder should be paid by comparison with the kind of rates paid for other work of like kind, that the Molders' Union agreed that "the placing of a limit upon the earnings of a member should be discontinued in shops of members of the S.F.N.D.A." For a generation before the arbitration agreement was entered into, the molders had limited output primarily to protect piece rates and the practice continued under the agreement until clause 16 was adopted. These are only a few of the many cases that may be cited in which limitation was resorted to in order to prevent rate cutting. * * *

Slichter, *Union Policies and Industrial Management* (Brookings Institution 1941) pp. 166-167:

> *Formal* limits upon output . . . are found more frequently among pieceworkers than among timeworkers. At their *inception* the purpose of limits applying to pieceworkers is . . . partly to protect the union from being weakened by jealousies and dissensions arising from the fact that some workers receive better jobs than others, partly to prevent foremen from playing favorites in assigning jobs, and partly to prevent employers from cutting liberal piece rates or from using the high earnings of some workers in an argument against a general increase in piece rates. (Emphasis in text).

Kennedy, *Union Policy and Incentive Wage Methods* (Columbia University Press, 1945) at p. 111:

> For the most part workers look upon restriction of output as a general preventive measure, the primary motive being to avoid cuts in existing rates or lower fu-

ture rates which might result if present rates and standards were "spoiled" by high levels of production and earnings.

Douty, *Wage Structures* (Inst. of Ind. Rel., U. Cal., 1954) at p. 32:

> A study some years by the Bureau of Labor Statistics of collective bargaining provisions relating to wage incentives points out that:
>
> > Much of the opposition of workers to incentive plans is due to past experience with rate cutting and the speed-up. The claim has been made that whenever workers became adept at an operation and increased their output, and thereby their earnings, management would re-time the job and cut the rate for the operation so that workers turned out more with no corresponding increase in pay. Piece rates were sometimes lowered without clear justification, or on the ground that some adjustment in machinery or process had warranted a re-timing of the work. Even where rate changes were justified by some change in operation, workers often felt that a more than proportionate reduction in rates had been made. Management also would re-time jobs after workers had hit their stride and then set the new, high production level as the normal standard for base pay, resulting in a speed-up.

With respect to the nature of specific union agreement provisions on wage incentives, this study states:

> Most of the detailed provisions in the agreement are concerned with establishing safeguards and controls against abuse of the incentive wage principle. . . .

J. K. Louden (Production Manager, Glass and Closure Div. of Armstrong Cork Co.), *Wage Incentives* (1944), at pp. 29-30:

The Element of Fear in the Worker's Resistance to Wage Incentives

* * *

This fear and its accompanying resistance to incentives usually take the following patterns:

1. Their job will be de-emphasized to the degree that their skill and knowledge are no longer economic assets to them.

2. They will be required to work at a pace they cannot maintain without injury to their health, causing them to age prematurely.

3. There will be a reduction in the force, which will throw them out of work.

4. If they do not meet the standards every day they will either lose their jobs or be demoted.

5. The rate will be cut as production increases so that they will have to turn out more and more work for the same money.

Stein, Davis, & O'rs., *Labor Problems in America* (1940) at p. 463:

> . . . workers have learned through bitter experience that their earnings must not mount sharply when they work on a piece basis. There have been cases where workers on a piece basis increased their production by 200 per cent or more, only to discover that the high weekly earnings stimulate the employer to cut the rates. One cut in rates follows another until the workers earn no more for the new production than they did for the old. It does not take many experiences of this sort to make workers feel that it is dangerous to produce too much, even on a piece basis.

Leiserson, *The Economics of the Restriction of Output*, pp. 63-6, reprinted in Bakke, Kerr & Anrod, *Unions, Management, and the Public* (2d ed. 1960.) at p. 399:

> From the time the young worker enters on his first industrial experience and meets the mass pressure for restriction to the end of his days in the shop when he is exerting pressure on younger people to protect his earnings and his job, he works in an atmosphere charged with restriction. . . . If "incentives" are dangled before him in the form of standard tasks, premiums, bonuses and other devices, he soon notices that the rate per piece goes down as the bonus or premium goes up; and he learns that the inducement is to turn out more product for each dollar of pay. When he is asked to work short-time because the company cannot use the output of the employees, or when he sees fellow workers laid off because a smaller number can turn out the amount of work the company wants, the dangers of "over-production" are forcefully brought home to him.

Van De Water, *A Fresh Look at Featherbedding*, Baylor Law Rev., Spring 1955, pp. 139-51, reprinted in Bakke, etc., op. cit., at 401-2:

> *Arguments in support of work restriction* in specific instances include the claim that such practices are necessary to avoid substandard working conditions, technological employment, competition from those not earning their livelihood at the particular trade, unsafe working conditions (particularly in the case of railroad operation), job strain, temporary layoffs, the "speed-up," the "stretch-out" (i.e., requiring an employee to cover too many jobs or machines), rate-cutting (i.e., requiring increased production for the same amount of pay, by raising output standards once increased efficiency is induced by a wage incentive system), routinized job operations, and the anonymity resulting from the modern assembly line.
>
> * *
>
> *In opposition to work restrictions* it is argued that any substantial and general increase in real wages must arise out of increases in productivity and labor unions generally lack an appreciation of management's need to

increase productivity in the individual concern if wages are to be raised and competitive position is yet to be maintained. It is argued that output restrictions have caused unnecessary expense and have proved a selfish deprivation of the benefits of technological improvement to the public in general, at times destroying small businessmen as competitors where "union stabilization" programs are involved, and hindering the opportunity which would otherwise arise for workers as a whole to be financially better off. It is contended that restrictive practices are the principal reason for the poor financial condition of the railroads in this country. It is further argued that work restrictions will not prevent technological unemployment, and may indeed increase such unemployment through raising labor costs to the place where management is induced to install more labor-saving machinery. . . . (Emphasis in text.)

See also: Lytle, *Wage Incentive Methods* (1942), Ch. 2, at p. 62: "Union Attitude Toward Incentives."

Dickinson, *Compensating Industrial Effort* (1951), Ch. 8, "The Standard Task or Time Allowance; Limitation of Output," pp. 126, et. seq.

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL 283, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO (WISCONSIN MOTOR CORPORATION)

and

RUSSELL SCOFIELD, an individual
LAWRENCE HANSEN, an individual
EMIL STEFANEC, an individual
GEORGE KOZBIEL, an individual

Cases Nos. 13-CB-1059-1
13-CB-1059-2
13-CB-1059-3
13-CB-1059-4

On June 7, 1962, Trial Examiner A. Norman Somers issued his Intermediate Report in the above- entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed, as set forth in the Intermediate Report attached hereto. Thereafter, the General Counsel and the Charging Parties filed exceptions to the Intermediate Report and briefs in support of their exceptions.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions.

The facts in this case are fully set forth in the Intermediate Report and will only briefly be touched upon here.

The Respondent Union, whose membership is restricted to employees of the Company, has been the bargaining representative of the Company's employees since 1937. Its present contract, like earlier ones, contains a union-security clause which provides that employees have the option of either joining and maintaining good standing in the Union, or rejecting membership but paying the Union a "service fee."

During the past 25 years there has been in effect a union rule, revised from time to time, setting produc-

tion ceilings on piece work, or, more accurately, limiting the amount of incentive pay a member may earn.[1] As declared in the union bylaw, the rule is designed to implement the Union's "basic object . . . to protect members . . . in their employment and to give them as much security as the industry can provide." In operation, the ceilings, in each of the five labor grades, impose a limitation on the amount a member may earn over the machine rate, the minimum contract rate for that job classification. At present the ceilings are set at between 45 and 50 cents per hour over the machine rate. The union does not require that the member cease production when he has attained the ceiling rate for the day; he may continue working, but, in order to comply with the rule, he must not report, for credit toward his earnings, any items produced in excess of the amount permitted to be earned under the production quotas. He must, by a bookkeeping entry, "bank" this production for later payment. An employee may draw on his "bank" when for one reason or another he fails to earn the basic machine rate or even the lower "day rate." This may occur, for example, when he is sick and unable to work, or his machine is out of order. The Company itself, however, places no limitations on an employee's earnings. It will, if he so desires, pay him immediately for all production which he reports.

Members who violate production ceilings are subject to a fine of $1 for each violation, but persistent violators may be subject to a charge of conduct unbecoming a member, in which event a fine of $100 or a lesser amount may be imposed and a member suspended. A member who pays a fine may also be expelled. It is undisputed,

[1] Approximately half of the Company's 800 or more employees work under an incentive pay plan.

however, that the Union's sanctions to enforce the rule may not be extended to impair a member's status as an employee. The rule of course has no application to nonmembers who may be employees of the Company.

The rule limiting incentive pay is not incorporated in the contract as a term of employment. Although the Company does not consider itself bound by the rule, and at various times during negotiations has unsuccessfully sought to induce the Union to drop the ceilings, the Company nevertheless as a practical matter has accepted the ceilings as an integral part of the *modus operandi* and has recognized the ceilings as forming an important element of its negotiated wage structure. So far as appears, the Company has never sought to discipline any of its employees for adherence to the Union's ceiling restrictions. The Company uses the ceilings in computing wages and evaluating jobs. Ceilings have also played an important role in the negotiation of collective-bargaining agreements between the Company and the Union. Thus, in 1953, one of the Company's proposals was that the ceilings be increased at least 10 percent. The contract that year made provisions for a 13 cents per hour increase in ceilings. The 1956 strike settlement agreement provided for another increase in ceilings. In 1959, the Company made no request for the elimination of ceilings, but only requested that they be increased 10 cents.

Moreover, while abstaining itself from enforcing the ceiling rule, the Company voluntarily aids and cooperates with the Union in the administration of the rule. Thus, the Company joins in the "banking" procedures by making the necessary bookkeeping entries. The Company also allows the ceilings to be posted on its bulletin boards. And it assists the Union in policing enforcement

of the rule by making available to the Union the members' production records and allowing the union stewards to inspect such records on Company time without loss of pay.

At such an inspection, conducted in February 1961, the Respondent Union found that the Charging Parties had violated the rule by exceeding their production quotas. The Charging Parties are all members of the Union, who, by their decision to join, have elected to subject themselves commonly with other union members to union regulation and discipline. Following a hearing before the Union's trial board, each of the Charging Parties was found guilty of conduct unbecoming a member. Penalties were assessed against them, consisting of up to a year's suspension from membership and fines ranging from $50 to $100. In October 1961, the Charging Parties having failed to pay the fines, the Union brought suit in a State court to recover the amount of the fines. No evidence as to the outcome of the suit is before us. No action has been taken, or threatened, to impair the job status of the individuals involved.

The complaint alleges, and the answer denies, that the Union's action in imposing fines for breach of its production rule constituted a violation of Section 8(b)(1)(A) of the Act. That Section provides:

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of their rights guaranteed in Section 7, provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

In his full discussion of the issues, the Trial Examiner concluded, we believe correctly, that neither the legisla-

tive history of the Section nor the body of the law dealing with and interpretating the Section since its enactment in 1947 as part of the Labor-Management Relations Act (the Taft-Hartley law) supports the view that Section 8(b)(1)(A) was intended to interdict the conduct under examination.

The General Counsel argues for a different reading of the legislative history, one that would give a broader interpretation to the language of the Section; he urges that the imposition of a fine constitutes restraint and coercion within the meaning of Section 8(b)(1)(A). Essentially, it is the General Counsel's position that the legislative purpose in enacting Section 8(b)(1)(A) was to protect the freedom of the individual workman from duress by the union as well as by the employer, and that it was the intent of Congress "to impose upon unions the same restrictions which the Wagner Act imposes upon employers with respect to violations of employee rights."[2] While there may have been such a general legislative purpose, this is not to say that Congress did not place certain limitations on that purpose. For one thing, the legislative history of Section 8(b)(1)(A) points to a Congressional intent to reach only certain limited conduct on the part of labor organizations. Thus, the Supreme Court in *Curtis Brothers*,[3] in commenting on the tenor of the expressions which preceded the Senate debate as to the Section's purpose, observed that "the note repeatedly sounded there is as to the necessity for protecting individual workers from union organizational tactics tinged with violence, duress or reprisal." The Conference Report makes it evident that the Section was

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[2] *International Ladies' Garment Workers' Union* v. *N.L.R.B. (Bernhard Altman)*, 366 U.S. 731, 738.

[3] *N.L.R.B.* v. *Drivers, Chauffeurs, and Helpers, Local 639 (Curtis Brothers)*, 362 U.S. 274.

so understood by the House. The House accepted the Senate bill as covering the same ground as its own proposed Section 12(a)(1),[4] a Section which would have made unlawful the use of force, violence, physical obstruction or threats thereof to accomplish certain purposes associated with organizational activity and strikes.[5]

If, as the General Counsel contends, the decision in *Bernhard Altman*[6] suggests a broader reach of Section 8(b)(1)(A), it is nonetheless evident that internal union disciplines were not among the restraints intended to be encompassed by the Section. Thus, as the Trial Examiner points out, when the introduction of Section 8(b)(1)(A) touched off expressions of apprehension that its language could be construed as interfering with the internal affairs of unions, Senator Taft, even before the proviso to the Section was introduced, affirmed that the sponsors had no intention to interfere with a union's internal affairs. The same opinion was voiced by Senator Ball on the introduction of the proviso. On that occasion he stated, "I merely wish to state to the Senate that the amendment offered by the Senator from Florida is perfectly agreeable to me. It was never the intent of the sponsors of the amendment to interfere with the internal affairs or organization of unions. The amendment of the Senator from Florida makes that perfectly clear." At a later point in the Senate consideration of the bill

[4] I Legislative History 546.

[5] I Legislative History 204-205.

[6] 122 NLRB 1289, affirmed *International Ladies' Garment Workers' Union, AFL-CIO* v. *N.L.R.B. (Bernhard-Altman)* 366 U.S. 731. In that case the Court upheld the Board's finding that the execution of a collective-bargaining agreement with a minority union whereby that union is recognized as the exclusive bargaining representative of all employees in the unit, restrained and coerced employees in that unit, and that this restraint and coercion was practiced both by the company and the union.

Senator Ball stressed the limited scope of the prohibitory part of the Section when he explained that the proviso:

> . . . is designed to make it clear that we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the coercive and restraining acts of the union in its efforts to organize unorganized employees.

The expressed disavowals of the sponsors, and other legislative facts marshalled by the Trial Examiner, make clear that Section 8(b)(1)(A) was not intended to reach the conduct here involved, even without regard to the purpose of the proviso, because, as is pointed out, it was not the kind of activity with which Section 8(b)(1)(A) was concerned.[7]

Proceeding from the premise that the prohibitory part of 8(b)(1)(A) was applicable to the type of conduct here involved, the General Counsel contends further that such conduct is not protected by the proviso to the Section. He concedes, however, that even though a fine be deemed coercive, it nevertheless would not violate Section 8(b)(1)(A) if the fine were merely an incident to "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership." But because in this instance the fine was collectible as a debt and not by threat of expulsion only, the General Counsel argues that the fine had more than the incidental relationship which would exempt it from the reach of the Section.

We do not read the language of the proviso so narrowly. There is nothing in the legislative history which suggests that Congress intended to permit a union to expel a member for violation of a union bylaw, but not to fine him for the same infraction without expelling him;

[7] See *International Association of Machinists* v. *Gonzales*, 356 U.S. 617.

or that it could enforce the fine by expulsion from the union but not by suing for its collection.

On the contrary, as the Trial Examiner has shown, Congress was more concerned with placing restrictions on a union's right to expel than to fine members. Thus Section 8(c)(6) of the House bill more severely limited the right of expulsion from a union than did 8(c)(5) of the same bill which dealt with limitations on a union's right to fine its members. The latter merely enjoined the use of fines as a penalty for members exercising certain basic civil rights of the kind now protected in the "Bill of Rights" portion of the Labor-Management Reporting and Disclosure Act of 1959. Neither of these provisions prohibited a union from disciplining a member for the infraction of a union rule of the type here involved. As the Trial Examiner has so aptly observed, to accept the General Counsel's attempted distinction is to conclude that, despite the express disavowals by the sponsors of Section 8(b)(1)(A) of any intent to interfere in the internal affairs of unions and despite the rejection of House attempts to do so, the result of the enactment of present Section 8(b)(1)(A) was to impose more stringent restrictions on union discipline than even those prohibited in the rejected House measures.

In other words, it is most unlikely that with knowledge of the long existing union practice of enforcing internal union policies by fine as well as by suspension and expulsion, and disavowing any intent to interfere in the internal affairs of unions, Congress intended to leave a union with no power to deal with offending union members except, as the General Counsel asserts, either by tolerating them or by expelling them from membership, a procedure that could well prove self-defeating.

In support of his construction of the proviso to Section 8(b)(1)(A), the General Counsel relies on a certain dictum of the court in the *Allen Bradley* case,[8] which, reversing the Board, held that it was not a violation of Section 8(a)(5) and (1) of the Act for an employer to insist as a condition precedent to entering into a collective-bargaining contract that the union agree to the employer's proposal limiting the right of the union to discipline union members for refraining from participating in strikes called by the union. The Board does not acquiesce in this decision or in the dictum upon which the dissent relies. Not only is the decision contrary to the Board holding in this as well as in other cases,[9] but it is also inconsistent with holdings of other Courts;[10] and with the same court's holding in the *American Newspaper Publishers'* case,[11] where the court

[8] *Allen Bradley Company* v. *N.L.R.B.*, 286 F. 2d 442 (C.A. 7), setting aside 127 NLRB 44.

[9] *Minneapolis Star and Tribune Company*, 109 NLRB 727, 729 (". . . the imposition of a $500 fine on Carpenter by the Respondent Union for his failure to engage in certain of its activities is not violative of Section 8(b)(1)(A) of the Act. It is well established that the proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization.")

[10] *Local 248, UAW* v. *Wisconsin Board*, 11 Wis. (2d) 292, 105 N.W. (2d) 278 (Union fine of member for crossing a picket line during strike held arguably protected by the proviso to Section 8(b)(1)(A)); *UAW* v. *Woychik*, 5 Wis. (2d) 528, 93 N.W. (2d) 336 (Union may recover fine levied against member for failure to picket during strike.); *Retail Clerks* v. *Christiansen*, Washington Justice Court, Grays Harbor County, 54 LRRM 2558 (Union may recover fines imposed against members who continued working during strike. "It is the court's opinion that inasmuch as there has been no interference affecting the right of defendants in their employment and that the action involves only the employees and the union, and the charges are based upon specific violations and the fines imposed under the authority of the bylaws, that this is an action which is one involving the internal affairs of the union and Sections 7 and 8 of the Act are inapplicable. . . . [A] union may reasonably discipline its members for infractions of its laws, rules and regulations so long as the discipline does not deprive the member of his property right.")

[11] *American Newspaper Publishers' Association* v. *N.L.R.B.*, 193 F. 2d 782, 800-801 (C.A. 7).

agreed with the Board that a union did not violate Section 8(b)(1)(A) by threatening to expel any member who worked in a composing room where all the employees were not members of the union.

It is also significant that while the Board, during the 12 years following Taft-Hartley, has interpreted Section 8(b)(1)(A) and its proviso so as not to interfere in a union's internal affairs,[12] Congress has not indicated that a broader interpretation of the Section was intended or desired. Moreover, as pointed out by the Trial Examiner, the legislation which Congress did enact in 1959 sheds further light on the problem before us and buttresses the conclusions which we reach. The Landrum-Griffin amendments contain a fairly comprehensive code governing the internal affairs of labor organizations. Jurisdiction over these matters was not, however, given to the Board. Rather it was the Federal Courts which were authorized to enforce the new law.[13] Furthermore, insofar as is relevant here, these 1959 amendments went no further than to impose certain notice and hearing requirements on the imposition of union discipline[14] and prohibited the use of such discipline to prevent employees from exercising certain fundamental freedoms.[15]

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[12] See *Minneapolis Star and Tribune Company*, 109 NLRB 727, 729. We do not agree with the General Counsel that there is an implication in the Board's decision in that case that the imposition of the fine was collectible only by threat of expulsion.

[13] See *McCraw v. United Association, Local Union No. 43*, U.S. District Court, Eastern District of Tennessee, 216 F. Supp. 655 (1963). See also Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 102.

[14] Labor-Management Reporting and Diselosure Act of 1959, Title I, Section 101(a)(5).

[15] Labor-Management Reporting and Disclosure Act of 1959, Title I, Section 101(a)(2).

These laws show that Congress has not ventured to the outermost limits in regulating internal union affairs. Some subjects still remain unregulated under existing Federal law.[16] Thus, we cannot agree that, 12 years earlier, Congress had enacted the substantial and far reaching limitations on the powers of unions to prescribe rules governing the conduct of their members, as urged by the General Counsel.[17]

Our dissenting colleague argues forcefully that the proviso to Section 8(b)(1)(A) permits the imposition of union rules on employees as *union members,* but does not apply to the enforcement of rules against employees as *employees.* Proceeding from this premise, the dissenting opinion then finds that the subjects of production and wages are matters "clearly related to *employment* and not to *membership*. . . ." But the conclusion does not follow the distinction. Obviously, production and wages are related to jobs. Jobs are related to employees and employees may, if they so desire, be union members. A union rule that a *member* is subject to a fine if he exceeds a production ceiling does not mean that he is subject to such a fine as an *employee.* Nor does it mean that his employment status is affected so long as the Union does not attempt to exact payment of the fine by pressure on his employer or discrimination in his job opportunities.

It should not need saying that unions exist for the purpose of collective bargaining with respect to wages,

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[16] See *Aaron,* The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. Law Rev. 851.

[17] See the Supreme Court's observation in the *Curtis* case that later statutes may be taken into account in interpreting vague language of an earlier law. *N.L.R.B.* v. *Drivers, Chauffeurs, etc., Local 639 (Curtis Brothers),* 362 U.S. 274, 291-292.

hours, and conditions of employment. Necessarily, their constitutions and bylaws reflect this basic purpose. In a sense, virtually all union rules affect a member's employment relationship.

But the Board has not been empowered by Congress to police a union decision that a member is or is not in good standing or to pass judgment on the penalties a union may impose on a member so long as the penalty does not impair the member's status as an employee. Our dissenting colleague's view would require the Board to sit in judgment on union standards of conduct for its members even though such standards are not enforced by threats affecting the member's job tenure or job opportunities. Whether or not the Union's rule in this case is desirable or equitable is a matter we need not and do not decide. It is sufficient, in our view, that the Union deliberately restricted the enforcement of its rule to an area involving the status of a member as a *member* rather than as an *employee.*

We find, in argument with the Trial Examiner, that the Respondent did not violate Section 8(b)(1)(A) of the Act.

ORDER

IT IS HEREBY ORDERED that the complaint filed herein be, and it hereby is, dismissed.

Dated, Washington, D. C., Jan. 17, 1964.

FRANK W. MCCULLOCH, *Chairman*
JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member Jenkins, concurring:

I concur in the result reached by the majority, but would predicate the result on a more simplified basis which concedes much of the argument advanced by my dissenting colleague. Nothing in the Act seeks to regulate the right of a labor union to place a ceiling on the earnings of its members. Therefore the subject matter of the rule, like other union rules pertaining to matters such as meeting attendance requirements, cannot be said of itself to offend the Act even if it were an unreasonable rule. The only issue presented by the Charge is whether in some manner the enforcement of the rule has restrained or coerced the Charging Parties in their exercise of Section 7 rights.

In the context of this case, it cannot be said that enforcement of the rule is coercive since the Charging Parties were free either to join the Union and be subject to the rule, or refrain from joining and not be subject to the rule. The Charging Parties would have it both ways. It is axiomatic that the rights guaranteed under Section 7 are not absolute rights and that alternative choices must often be made by those who would exercise those rights. Had the Union here sought a benefit for its members which was denied to nonmembers, the action would clearly have been coercive. Cf. *Radio Officers* v. *Labor Board (Gaynor News)*, 347 U. S. 17. Certain it is, however, that where, as here, the Union imposes restrictions upon its own members which are not imposed upon nonmember employees, the action may not logically be described as coercive. The fact that some members of the union dislike and refuse to abide by the rule no more causes it to violate the Act than did the top seniority accorded to employees of the larger of two merged employers in *Trailmobile Co.* v. *Whirls*,

331 U. S. 40, or to shop stewards in *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521.

Dated, Washington, D. C., Jan. 17, 1964.

HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

Member Leedom, dissenting:

This case presents the question of whether a union that has unilaterally promulgated a restrictive scheme of work production quotas may, with legal impunity, enforce that scheme against employees, members of the union, through the imposition of severe retaliatory penalties, including monetary fines.

Since 1938, Respondent Union has had an established scheme of production ceilings or work quotas. The production ceilings, first formulated pursuant to a "gentleman's agreement" between union members, were later formalized by a union resolution, and finally became the subject of a union bylaw. The bylaw, *inter alia*, provides that members who fail to abide by the work quotas shall be subject to a fine, and, in the case of habitual offenders, discipline by ths Union on the charge of conduct unbecoming a union member.[18] At present the production

[18] The bylaw, in pertinent part, reads as follows:

A. The basic object of the Union is to protect members of the Union in their employment and to give them as much security as the industry can provide. The Local Union in its judgment and reasoning has established a production ceiling which it feels will bring more protection to the members. It follows that a member who is found in violation of the [sic] this rule is guilty of conduct unbecoming a union member.

B. Any member who violates these ceilings shall be subject to a fine of one dollar ($1.00) for each violation. The violators shall be processed by not less than 3, nor more than [sic] than 5 members of the Executive Board.
In case of persistent ceiling violations, the member will be charged with conduct unbecoming a Union Member.

ceilings limit an employee's earnings to 45 to 50 cents per hour over the machine rate, which is based on minimum employee production requirements.

The contract between the Employer and the Union contains a union-security provision. By its terms all employees are required to become members of the Union after the thirtieth day of employment or pay a service fee which shall not exceed the amount of the Union's monthly dues.[19]

The Employer has placed no limits on the employees' production or earnings and has vigorously opposed such a limitation, but without success. The Company is in a highly competitive market, and the increased costs resulting from the Union's production ceilings have caused a decline in its competitive position. The record shows that the Union's production ceilings have reduced and slowed down production, that an employee can reach the production ceiling in five hours, and that the employees have read books, played cards, and talked in the remaining time.[20]

In February 1961, the Union discovered that the Charging Parties had been violating the work quota rule. Subsequently, a hearing was held before the Union's trial board, and each of the Charging Parties was found guilty of "conduct unbecoming a Union member,"

[19] While, in light of the presence of the service fee provision in the contract it can not be said as a matter of law that *all* employees were required to join the Union, it is obvious that the contract provisions left so little to choice that, as a practical matter, the employees were compelled to join the Union in order to obtain the most value for the money they were required to expend.

[20] In spite of this, the employees produce more than the production ceilings allow. The excess is "banked" for payment in the future when an employee is unable, for any reason, to produce the maximum allowable under the production ceilings.

was fined $50 to $100, and was suspended from union membership. In October 1961, the Union brought suit against the Charging Parties in a state court to collect the fines.

On these facts, the General Counsel issued a complaint against the Union, charging that the fines that were imposed restrained and coerced employees in the exercise of their Section 7 rights and therefore violated Section 8(b)(1)(A) of the Act.[21] My colleagues are validating the Union's actions. I disagree. In my opinion, my colleagues' holding misconstrues a very basic section of the Act, misinterprets Congressional intent, undermines Congressional policy, and disregards established precedent.

In refusing to abide by the Union rule, the employees were exercising their Section 7[22] right to refrain from Union activity.[23] In fining the employees, the Union was attempting to force these employees to cease exercising

[21] Section (b)(1)(A) provides as follows: It shall be an unfair labor practice for a labor organization or its agents: (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

[22] Section 7 of the Act reads:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the rigth to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

[23] *Printz Leather Co., Inc.*, 94 NLRB 1312. My colleagues apparently concede that the Charging Parties were exercising their Section 7 right in refusing to limit their production pursuant to the Union's rule for, absent such right, it would have been unnecessary to reach the issues discussed in the majority opinion.

that Section 7 right. The question is whether the fine employed by the Union as a sanction to compel the Charging Parties to comply with the Union rule constitutes restraint or coercion within the meaning of Section 8(b)(1)(A), and, if so, whether the Union's action is nevertheless protected by the proviso to that Section. I think it is clear that the fines imposed do constitute such restraint and coercion, and that the proviso does not afford any protection to the Union.

The Supreme Court has left little, if any, room for argument over the meaning of the words "restrain or coerce" used in Section 8(b)(1)(A). In *N.L.R.B.* v. *Drivers, Local No. 639 (Curtis Brothers)*, 362 U. S. 274, which involved the question of whether recognitional picketing by a minority union constituted a violation of Section 8(b)(1)(A), the Court, after a thorough analysis, concluded that Section 8(b)(1)(A) was "a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof — conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes."

A careful reading of the Court's opinion shows that the word "reprisal," as used by the Court, means economic as well as physical reprisal, and specifically includes financial exactions.[24] Thus, the Court referred to some

[24] In this connection, I point out that the economic pressure inherent in a fine is not unlike the pressure caused by the threat of loss of employment which has always been recognized as economic "intimidation" or "reprisal" constituting a violation of Section 8(b)(1)(A). (See, for example, *International Association of Bridge, Structural & Ornamental Iron Workers*, 112 NLRB 1059; *Marlin Rockwell Corporation*, 114 NLRB 553, 562; *Tellepsen Construction Co.*, 122 NLRB 568; *Local 138 International Union of Operating Engineers (Nassau & Suffolk Contractors Assn.)*, 123 NLRB 1393, 1396. In my opinion there is little difference between a union's causing the discharge of an employee for refraining from engaging in concerted activity, and a union's fining

of the examples mentioned by Senator Ball in the legislative debates involving threats of "violence, job reprisals and such repressive assertions as that double initiation fees would be charged those who delayed joining the union," as the type of conduct against which Section 8(b)(1)(A) was directed; and the Court summed up the "central theme" of the legislative debates on the Section as seeking "the elimination of the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal."[25]

In the later *International Ladies' Garment Workers' Union* v. *N.L.R.B., (Bernhard-Altmann)* case, 366 U. S. 731, the Court set forth the proposition that Section 8(b)(1)(A) prohibited "unions from invading the rights of employees under Section 7 in a fashion comparable to the activities of employers prohibited under Section 8(a)(1)," pointing out that it was the "intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights."[26]

The Board itself in the past has read "restrain or coerce" in Section 8(b)(1)(A) in a manner consistent with the ordinary meaning of the term. Thus the Board has held that compulsion by sanctions, such as fines and

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the partial, or total, equivalent of his salary for refraining from engaging in concerted activity. Each is an equally potent form of economic restraint and coercion, and the net effect of each on the employees involved could be identical.

[25] *Curtis Brothers, supra,* at p. 286-87. The Court cited the remarks of Senator Taft in which he stated that Section 8(b)(1)(A) was intended to outlaw threats of "economic reprisal," and also cited with approval the language of the Board's decision in *Perry Norvell Co.,* 80 NLRB 225, listing economic reprisal as one of the means proscribed by Section 8(b)(1)(A).

[26] *Bernhard-Altmann, supra,* at p. 738.

expulsion from membership, "are in fact coercive,"[27] and has also found that other forms of pressure directed against employees, including threats not to process grievances,[28] threats of union disciplinary action and expulsion,[29] and causing a reduction in seniority,[30] likewise constitute restraint and coercion within the meaning of Section 8(b)(1)(A).

Accordingly, consistent with the foregoing authoritative case law, I am of the opinion that the fines levied by the Union against the Charging Parties in the instant case constitute restraint and coercion under Section 8(b)(1)(A) of the Act.[31]

The proviso to Section 8(b)(1)(A) does not compel a contrary conclusion. That proviso excepts from the

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[27] *Peerless Tool and Engineering Co.*, 111 NLRB 853, 857; see also *Minneapolis Star and Tribune Co.*, 109 NLRB 727, in which the Board adopted the Trial Examiner's conclusion that a fine was a "form of coercion."

[28] *Ibid.*

[29] *Local 401, International Brotherhood of Boilermakers (M.A. Roberts & Co.)*, 126 NLRB 832, 834; *United States & Allied Products Workers (Gibsonburg Lime Products Co.)*, 121 NLRB 914.

[30] *Miranda Fuel Company, Inc.*, 140 NLRB 181.

[31] The legislative history of Section 8(b)(1)(A) fully supports this interpretation that the language, "restrain or coerce," covers the conduct herein. Section 8(b)(1)(A) originated in the Senate as an amendment to S. 1126. It was sponsored by a group of Senators who could "see no reason whatsoever why [unions] should not be subject to the same rules as the employers" and accordingly introduced Section 8(b)(1)(A) as a corresponding section to 8(a)(1). (Senate Report No. 105 on S. 1126, Supplementary views, Leg. Hist. of the LMRA, 1947, Vol. I, p. 456) Senator Ball, who introduced the amendment, explained that its purpose was "to insert an unfair labor practice for unions identical with [Section 8(a)(1)] . . ." which was essential "to equalize the rights and responsibilities of both employers and unions in this field, to really assure to employees the fredom supposedly guaranteed in Section 7, . . ." (Leg. His. of the LMRA, (1947), Vol. II, p. 1018, 1021.) During the debates, Senators repeatedly stressed that Section 8(b)(1)(A) was to be read and interpreted as broadly as its Wagner Act counterpart. When Senator Pepper asked what the interpretation of the language "restrain or coerce" would be, Senator Taft answered that "the Board has been defining those words for 12 years . . ." and although the "application to labor organizations may have a slightly

ambit of 8(b)(1)(A) only such restraint or coercion that results from a union's application of its rules relating to "the acquisition or retention of membership."[32]

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different implication . . . from the point of view of the employee the two [sections] are parallel." (Leg. Hist. of the LMRA, 1947, Vol. II, p. 1028, and to the same effect p. 1032-33.)

Contrary to my colleagues, it does not appear that Congress intended to limit Section 8(b)(1)(A) to any particular type of rstraint or coercion. In the course of the debates, examples of the conduct that would be prohibited by Sestion 8(b)(1)(A) included threats of higher initiation fees or higher dues, "retaliatory" internal union disciplinary action, threats to strike, threats to picket, threas of loss of employment, economic pressure, and misrepresentation. (Leg. Hist. of the LMRA (1947) Col. II, pp. 1018-1019; 1200; 1205; p. 1029; p. 1030; p. 1031; p. 1192-93.) No attempt was made by Congress either to exhaust or to construct the scope of the statutory language. Further, I do not agree with my colleagues that the House understood that Section 8(b)(1)(A) covered only that conduct which had been dealt with under Section 12(a)(1) of the House Bill (H.R. 3020). Rather, the House Conference Report shows that Section 8(b)(1)(A) *included*, but was not limited to, the conduct outlawed by Section 12(a)(1) of the House Bill. Leg. Hist. of LMRA, 1947, Vol. II, p. 546.

[32] The legislative history of the proviso clearly shows that the restrictive terms in which the proviso was written were not chosen by accident, but by design, and that Congress meant just what it said, no more. The proviso originated in the Senate and was offered by Senator Holland as an amendment to Section 8(b)(1)(A). In introducing the amendment, Senator Holland stated that the proponents of Section 8(b)(1)(A) had not intended that section "to affect at least that part of the internal administration which has to do with the admission or the expulsion of members, that is with the question of membership," and that his amendment (the proviso) "would make clear that [Section 8(b)(1)(A)] would have no application to or effect upon the right of a labor organization to prescribe its own rules of membership either with respect to beginning or terminating membership." (Leg. Hist. of LMRA, 1947, Vol. II, pp. 1139, 1141.) Senator Ball, who accepted the proviso as an amendment to Section 8(b)(1)(A), replied that "it was never the intention of the sponsors of [Section 8(b)(1)(A)] to interfere with the internal affairs or organization of unions," and he subsequently described the proviso more specifically as covering "the requirements and standards of membership in the union itself." (Leg. Hist. of the LMRA, 1947, Vol. II, p. 1141; p. 1200.) In the face of these authoritative statements from the two men in the Senate most intimately acquainted wih he proviso, I cannot, as my colleagues do, subscribe to an interpretation based on the more general characterizations of certain legislators.

As the Board stated in *Marlin Rockwell Corp.*, 114 NLRB 553, 562:

> As we read the 8(b)(1)(A) proviso, its sole purpose is to guarantee to unions the privilege, as a voluntary association, *to determine both who shall be a union "member" and what substantive conditions a "member" must comply with in order to acquire or retain union membership status.* It is for this reason that the Board cannot and will not judge the fairness or unfairness of internal union determinations which may enable or disable particular individuals to obtain the incidental benefits of union membership as provided by internal union legislation. (Emphasis supplied.)[33]

And more recently, in *Allen Bradley Co.* v. *N.L.R.B.*, 286 F. 2d 442, the Seventh Circuit shared this view of the scope of the proviso saying:

> . . . [The] Board strenuously insists that the Company proposal was not a subject for bargaining because the Union in its coercive activities was protected under the proviso in Section 8(b)(1)(A), which authorizes the Union to prescribe its own rules "with respect to the acquisition or retention of membership therein." True, the fines which the Union had previously imposed and about which the Company was concerned were authorized by Union rule. Even so, *there is nothing in the situation before us which indicates that such fines bore any relation to the "acquisition or retention of membership." The Board evidently recognizes this because it argues, "imposition of the fine is merely a step in determining membership status; non-payment leads to expulsion."* We assume that a union has broad powers in prescribing rules relative to the acquisition and retention of its members. However, that power, in our view, is not absolute. *It goes beyond*

[33] See also *The Babcock & Wilcox Co.*, 110 NLRB 2116, 2132-3.

> *any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act. Coercive action whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union.* (Emphasis supplied.)[34]

I find the rationale of these cases most persuasive for it comports with the language of the proviso itself as well as its legislative history. This rationale, moreover, achieves the accomodation intended by Congress between the rights Congress guaranteed employees and the right of unions to determine their own qualifications for membership. In my opinion, therefore, it cannot reasonably be said that the Union's conduct here related to its right "to prescribe its own rules with respect to the acquisition or retention of membership . . . ." Accordingly, I conclude that Respondent's conduct is not protected by the proviso.

According to my colleagues, the proviso to Section 8(b)(1)(A) protects all internal union affairs or all action taken pursuant to the union's rules and internal processes. They attempt to prove that the proviso does not mean what it says by arguing that Congress did not intend to distinguish between expulsion and any other form

[34] My colleagues atempt to distinguish the *Allen-Bradley* case on the ground that the Court "was not called upon to find" whether the union had a right under Section 8(b)(1)(A) to fine a member for crossing a picket line and that, accordingly, the above portion of the opinion was *obiter dictum*. However, as the portion of the Court's opinion quoted above clearly shows, and as a reading of the Board's decision and brief in that case will confirm, the Board argued in that case that the union's conduct which the employer wished to subject to bargaining was protected by the proviso to Section 8(b)(1)(A). Therefore, it cannot rightly be said, as my colleagues do, that the Court's discussion of this issue "was not essential to a decision in the case."

of union discipline, such as a fine, in the application of the proviso. However, in view of the special treatment Congress gave expulsion, as opposed to any other form of coercion by union discipline, I think that Congress did intend such a distinction. Employees are specifically protected against coercion in the form of expulsion by the second proviso to Section 8(a)(3), which guarantees employees that expulsion for any reason other than nonpayment of dues and fees will not imperil their job security.[35] Thus, Congress preserved the right of unions to deny membership to, or terminate the membership of, whomever they pleased regardless of the reason; but, at the same time, Congress insulated employees from coercion by making sure that they would suffer no economic consequences as a result of such action.[36]

But even assuming that the proviso has a broader reach than I would ascribe to it, I would still disagree that the matter here involved is one that is merely a matter of internal union regulation. Employees may occupy a dual status: first, is their status as *employees;* second, is their

[35] My colleagues argue that no action has been taken here to impair the employees' job status or job opportunites. Apparently, they are unwilling to recognize that impairment of job status or job opportunities can take the form of restricting an employee in his earnings where, as here, that employee is willing to work and the employer wants the benefit of his services. That the fines were intended to have this restrictive effect cannot be denied.

[36] See the debate between Senator Taft and Senator Pepper, Leg. Hist. of LMRA, 1947, Vol. II, p. 1141-1142 and also p. 1096-97. As shown by the above rationale, there is nothing inconsistent in the decision of the Court of Appeals for the Seventh Circuit in *Allen Bradley* and the decision of the same court in *American Newspaper Publishers' Association* v. *N.L.R.B.*, 193 F. 2d 782. The latter case involved a union's threat to expel members, conduct which specificially falls within the proviso. Speaking of the proviso, the court said:

> . . . Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as 8(b)(1)(A) is concerned.

status as *union members.* Those matters affecting employees as *union members* may appropriately be referred to as internal union affairs. Those matters which affect employees as *employees* are not internal union affairs. Of course, it is quite possible that some matters may affect both the employment relationship and the membership relationship, but to the extent they involve the former, they are not internal union affairs. Here, I am satisfied that the Union's attempt to control production and wages, which are subjects clearly related to *employment,* and not to *membership,* is not merely an internal matter.

Under my colleagues' reading of the proviso, it would appear that the Union can turn any employment matter or Section 7 right into an internal union affair simply by adopting a union rule or bylaw dealing with the subject and disciplining employees thereunder.[37] But there is no evidence that Congress ever intended to permit the subversion of employees' rights by unions under the guise of

[37] For example, prusuant to a union rule or bylaw, unions, under my colleagues' decision, could now fine employees for filing charges with the Board against the union; for testifying against the union in Board proceedings, for filing a decertification petition, for refusing to give the union a copy of any statement made to a Board agent, for giving a statement to a Board agent without the union's approval, for refusing to participate in unlawful union activity, for working with nonunion employees, for working with Negro employees, for filing a grievance not approved by the union, for producing more than a certain number of items per day, and for working more than 30 hours per week.

regulating the conduct of union members.[38] In short, I think that when unions use the union membership of employees — membership which may, or may not, be voluntary — as a means of encroaching on their rights as employees, which Congress did regulate, the unions subject themselves to the sanctions of Section 8(b)(1)(A) of the Act. More particularly, by imposing fines on these employees because they exceeded the Respondent Union's unilaterally established work production quotas the Respondent Union took action which went beyond any permissible limit, that is, the action taken did not relate only to the internal affairs of the Respondent Union but imposed a sanction on its members because they exercised their right, guaranteed by the Act, not to go along with the Union imposed production quotas.

Accordingly, for all the foregoing reasons, I would find that the Respondent violated Section 8(b)(1)(A) of the Act, as alleged.

Dated, Washington, D. C., Jan. 17, 1964.

BOYD LEEDOM, *Member*
NATIONAL LABOR RELATIONS BOARD

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[38] See *Local 100, United Association of Journeymen and Apprentices* v. *Borden* 373 U. S. 690, in which the Supreme Court recognized that even though the union's action was based on the employee's failure to comply with internal union rules "it is certainly 'arguable' that the union's conduct violated Section 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules . . ." The Court went on to distinguish its earlier decision in *I.A.M.* v. *Gonzales*, 356 U. S. 617, on the ground that *Gonzales* involved matters relating to expulsion which was an internal union affair, not within the Board's competence by virtue of the proviso to Section 8(b)(1)(A). See also *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union* v. *Perko* 373 U. S. 701.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1967 January Session, 1968

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC; and GEORGE KOZBIEL,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board.

March 5, 1968

Before KNOCH, *Senior Circuit Judge,* and SWYGERT and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Petitioners, four employees of Wisconsin Motor Corporation ("the Company"), ask us to set aside an order of the National Labor Relations Board dismissing an unfair labor practice complaint that had issued upon their charges against their Union.[1]

Petitioners are members of a Union that has been the bargaining representative of the production employees

[1] Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO. The parent Union is an intervenor.

of the Company since 1937. The collective bargaining contract requires such employees to belong to the Union or to pay it a service fee equivalent to dues. The Company is based in West Allis, Wisconsin, where it manufactures motors. Half of its 850 production employees, including these petitioners, are compensated on a basis permitting them to earn amounts above their basic hourly wages by producing at a rate in excess of established hourly norms of output.

In 1944, the Union membership adopted a resolution providing in substance that "the men turn in [report for payment] no more than 10 cents per hour over and above the new machine rates." In 1946, the membership approved fines as penalties for violation of that ceiling rule. The penalties are presently contained in a February 1961 Union by-law which provides that any member violating the production ceilings is "guilty of conduct unbecoming a Union member" and subject to a fine of $1.00 for each violation. The by-law also provides that in case of persistent ceiling violations, the offender would be charged with "conduct unbecoming a Union member." If a member were found guilty of such conduct, he could be assessed with a maximum fine of $100 (enforceable within a specified time by automatic suspension or expulsion) or suspended or expelled from membership. The Union's sanctions do not impair a member's status as an employee of the Company.

Ceilings were established from time to time through collective bargaining between the Company and the Union although the Company did not agree to limit wages accordingly. Thus if an employee produced work in excess of the ceilings, the Company would on request pay him for his actual production without regard to the ceilings. So far the Company has been unsuccessful in

its bargaining for the elimination of the Union ceiling rates, but the ceilings on all piecework jobs were increased in July of 1953 and August 1956. The ceilings in effect at the time of this dispute were between 45 and 50 cents above the machine rates.

By Union rule, any production which a production employee member has turned out at a pace which would yield hourly rates above the ceiling rates is not to be reported to the Company for immediate compensation. Instead, such members are required to "bank" with the Company their earnings in excess of ceilings. On occasions when they receive less than ceilings (for example, through absence or enforced idleness), the Union permits the members to draw upon their "bank" by charging the Company for work previously produced but not reported for wage purposes. Although the Company normally acquiesces in the "banking" system, if an employee chooses to disregard the Union rule and report all production for immediate payment, the Company, as noted, will pay him even though the Union ceilings are exceeded.

In 1946, the Union first began enforcing its "banking" system by imposing fines. In 1961, the Union found that six members had violated the "banking" system by reporting to the Company for immediate payment production at a rate in excess of the Union ceilings. Two members were fined $35 each and paid their fines. Two of the petitioner members were fined $100 each, the third was fined $75, and the fourth was fined $50. Instead of paying their fines, the four petitioners filed unfair labor practice charges with the Regional Director of the National Labor Relations Board in May 1961. In October 1961, the Union filed a suit to collect the fines in the

Civil Court of Milwaukee County, Wisconsin, where it is still pending. In December 1961, the General Counsel of the Board issued a complaint charging that the Union, in fining and suing petitioners, had restrained and coerced them in the exercise of their rights under Section 7 of the National Labor Relations Act[2] and thereby violated Section 8(b)(1)(A)[3] of the Act. The Union and Company have taken no measures to impair the job status of the petitioners.

The Trial Examiner and the Board concluded that Section 8(b)(1)(A) had not been violated and dismissed the complaint. In view of the authoritative construction of that Section in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, we must deny the employees' petition for review.

As early as 1951, this Court construed the proviso in Section 8(b)(1)(A) in *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F.2d 782 (7th Cir. 1951), affirmed on other grounds 345 U.S. 100. There the union threatened to expel members for violation of a rule forbidding them to work in a shop with non-members. Even though the expulsion

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[2] Section 7 grants employees the right to refrain from concerted activities. It provides in pertinent part (29 U.S.C. § 157):

"Employees shall have the right to * * * engage in * * * concerted activities * * *, and shall also have the right to refrain from any or all of such activities * * *."

[3] Section 8(b)(1)(A) provides in pertinent part (29 U.S.C. § 158 (b)(1)(A)):

"(b) It shall be an unfair labor practice for a labor organization or its agents —

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

might involve the loss by the employee of his job and other economic benefits such as pension and mortuary provisions, we held (at pp. 800-801, 806):

> "Under this limitation [proviso] Congress left labor organizations free to adopt any rules they desired governing membership in their organizations. Members could be expelled for any reason and in any manner prescribed by the organization's rules, so far as § 8(b)(1)(A) is concerned. This interpretation has support in the legislative history of the Act. It is also significant that while the Board has been so interpreting this section of the Act during the past four years, Congress has not amended the section to indicate that a broader interpretation of the section was intended or desired. It is not within the power of the courts to write into this section of the Act, by interpretation, language which would broaden its scope.
>
> * * * * *
>
> "* * * the proviso in § 8(b)(1)(A) permits unions to enforce their internal policies upon their membership as they see fit."

In *National Labor Relations Board* v. *Amalgamated Local 286,* 222 F.2d 95 (7th Cir. 1955), the union threatened to deprive certain members of group and hospitalization insurance coverage because they had refused to pay various disciplinary assessments and fines which the Union had imposed upon them. Following the lead of *American Newspaper Publishers Association,* the Court held that under the proviso in Section 8(b)(1)(A) the union's threatened withdrawal of the insurance rights of the complaining employees as a disciplinary measure was in full conformity with its right to regulate its internal affairs.

Thus in this Circuit, even before the decision in *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, great breadth was accorded to the proviso in Section 8(b)(1)(A). In *Allis-Chalmers*, the opinion of the Court holds that the words "restrain or coerce" used in Section 8(b)(1), as shown by the legislative history of the Section, were not meant to encompass internal affairs of unions. In other words, internal union disciplines are not among the proscribed restraints. In reaching this conclusion, the Court was partly motivated by our national labor policy that clothes a union with powers analogous to a legislature, with union rules enacted by the majority becoming binding on the minority. The Court noted that in the case of a strong union, expulsion from membership is a far more severe penalty than a reasonable fine (at p. 183).[4] The Court's examination of the legislative history of Section 8(b)(1)(A) convinced it that the statute does not prohibit union imposition of disciplinary fines and suits to collect them. In reaching its conclusion that the body of Section 8(b)(1)(A) was inapplicable to fines and collection suits aimed at union members crossing picket lines and working during lawful strikes, the Court found cogent support in the proviso to Section 8(b)(1), stating (at pp. 191-192):

> "At the very least it can be said that the proviso preserves the rights of unions to impose fines, as a lesser penalty than expulsion, and to impose fines which carry the explicit or implicit threat of expulsion for nonpayment. Therefore, under the proviso the rule in the UAW constitution governing fines is valid and the fines themselves and expulsion for non payment would not be an unfair labor practice."

[4] See also Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 612, 622-623 (1959).

The Court found it unnecessary to decide whether Section 8(b(1)(A) "proscribes arbitrary imposition of fines, or punishment for disobedience of a fiat of a union leader" (at p. 195).[5]

In his concurring opinion, Mr. Justice White relied more on the proviso to Section 8(b)(1)(A) than on legislative history showing the inapplicability of the "restrain or coerce" language of the body of the Section. In joining in the opinion of the Court, he noted that there might be some internal union rules "which on their face are wholly invalid and unenforceable" (at p. 198).

Union opposition to piecework has a history in the labor union movement dating at least back to 1908.[6] Fines and expulsion of members for violating the present and antecedent ceilings have been the rule for 22 years. We are told that the work of a majority of these employees would be jeopardized by younger, more energetic employees, and that the rule is therefore intended to protect the well being of all members, for if the younger employees received higher pay by increased production, the older members, unable to turn out similar piecework quantities, would be demoralized and even face lay-offs. As the Trial Examiner pointed out, ceiling rules derive from a legitimate, traditional interest in union objectives. They reflect fears of (1) employees working themselves out of jobs by overproduction; (2) the establishment of a new productive norm lowering the piecework rate and the compensation for actual production; (3) morale-threatening jealousies and (4) health problems caused by too much pressure. These factors were cov-

[5] It should be noted that the amounts of the instant fines are reasonable, so that there is no need to read Section 8(b)(1) as barring court enforcement of them. We need not consider whether excessive fines would be proscribed by that Section.

[6] See Slichter, *Union Policies and Industrial Management* (1941), pp. 285-286.

ered in some detail in the excerpts from various labor authorities appended to his report (145 NLRB at pp. 1138-1141. One such authority explained the purpose of ceiling limits as follows:[7]

> "At their *inception* the purpose of limits applying to pieceworkers is not primarily to make work but partly to protect the union from being weakened by jealousies and dissensions arising from the fact that some workers receive better jobs than others, partly to prevent foremen from playing favorites in assigning jobs, and partly to prevent employers from cutting liberal piece rates or from using the high earnings of some workers as an argument against a general increase in piece rates. Such limits have in the past been common among the glass bottle blowers, the flint glass workers, the potters, the stove molders, and in 1940 are being imposed by the leather workers in Massachusetts."

Thus the rule has a rational basis, and we cannot say that it was not reasonably calculated to achieve a permissible end. Accepting the *Allis-Chalmers* stricture that in considering questions of union discipline a union is comparable to a legislature, our function is to determine whether these fines conform to policies formulated by the Union and not violative of its constitution or of federal law.[8] Since the end here was a legitimate union objective and the means were appropriate to enforce it, our hand should be stayed. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 420. Enough has been said to show that the Union's imposition of these fines was not arbitrary and that the rules themselves are grounded on

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[7] Slichter, *op. cit.*, pp. 166-167; see also pp. 296-305.

[8] Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1073-1074 (1951).

a long-standing policy and cannot be deemed invalid or unenforceable on their face.

Petitioners argue that the present rule circumvents the bargaining process, and that the Union should have to obtain a provision against incentive pay through collective bargaining with the Company. Since petitioners concede that the Union can validly impose ceilings through collective bargaining, it is no great departure to allow them to be imposed by a disciplinary rule enforcing ceilings already established by collective bargaining. If a union has validly established a policy against overproduction, it must have the concomitant power to discipline members who violate ceilings. Cf. Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951). Discipline has been described by the same author as the criminal law of union government. "The Law of Union Discipline: What the Courts Do in Fact," 70 Yale L.J. 175, 178 (1960).

As the intervenor pointed out, the rule enforced in *Allis-Chalmers* was of more serious economic consequence to the employees, for they were not permitted to work during that strike and their jobs might be forfeited. Here the employees were permitted to work even in excess of ceilings, with the additional earnings deferred under the Union's "banking" system. Their job rights were unaffected by the rule. Petitioners assert that "banking" involves a very small amount of the Company's production and does not overcome the Union's limitation on production, but under Section 8(b)(1)(A) of the Act, as interpreted in *Allis-Chalmers*, the Union rule would survive even if there were no provision to "bank" excess earnings.

Petitioners depend principally on *Allen Bradley Company* v. *National Labor Relations Board*, 286 F.2d 442

(7th Cir. 1961). There the question was whether the union was obliged to bargain in good faith over a collective bargaining contract provision proposed by the employer limiting the union's right to discipline or fine its members. The holding was that the proposals made by the company were a proper subject for collective bargaining. The question for resolution by this Court was not whether union discipline of members violates Section 8(b)(1)(A). Furthermore, in that case, Judge Major stated (at p. 446):

> "Coercive action, whether by way of fine, discharge or otherwise, which deprives a member of his right to work and his employer of the benefit of his services, cannot be said to relate only to the internal affairs of the union."

In the present case, no member has been deprived of his right to work nor has the employer been deprived of the benefit of a member's services. To the extent that a dictum in *Allen Bradley* disapproves union fines and collection suits aimed at members crossing the union's picket line and continuing to work for their employer, that dictum was flatly rejected in *Allis-Chalmers* and is no longer viable. But as *Allen Bradley* still holds, the Wisconsin Motor Corporation can require the Union to bargain over a demand to give up its ceiling rule.

Petitioners rely on *Printz Leather Co., Inc.*, 94 NLRB 1312 (1951), where the union threatened to strike if the employer did not discharge an employee who the union felt was working too fast. *Printz* is inapplicable because there the union's objective (unilateral imposition of production ceilings) and methods (threats to force the employer to discharge the employee) were manifestly improper. *Associated Home Builders of Greater East Bay, Inc.* v. *National Labor Relations Board*, 352 F.2d 745, 751-752 (9th Cir. 1965); *National*

Labor Relations Board v. *Brotherhood of Painters*, 242 F.2d 477, 480-481 (10th Cir. 1957). They also rely on *Charles S. Skura*, 148 NLRB 679, 683 (1964), which held that the union violated Section 8(b)(1)(A) by fining an employee-member for filing an unfair labor practice charge against the union without first exhausting internal union remedies.[9] The Board held that the union's objective was at odds with policy considerations because " 'no private organization should be permitted to restrict any person's access to courts of justice' ". No policy considerations of comparable strength militate against the Union rule here at issue.

The petition for review is denied.

No. 14693

KNOCH, *Senior Circuit Judge.* (dissenting) I think we are in error in concluding that Allis-Chalmers is dispositive of the case before us, and that there is a difference here only of degree and not of kind. The forceful dissent of the four Justices in Allis-Chalmers and the limited concurrence of Mr. Justice White seem to me to dictate a very cautious application of the principle of that case to other cases (such as this one) which involve no impairment of the collective bargaining power and its concomitant strike weapon. I fear that the majority have unduly extended the scope of Allis-Chalmers. In my opinion the coercive fines here imposed constituted an unfair labor practice, and the Board's dismissal of the complaint herein should be reversed.

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[9] This question is now awaiting argument in the Supreme Court in *Industrial Union* v. *National Labor Relations Board*, No. 796, present Term. No view is expressed herein as to the correctness of the *Skura* rule.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604
Tuesday, March 5, 1968

BEFORE

HON. WIN G. KNOCH, Senior Circuit Judge
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN; EMIL STEPANEC and GEORGE KOZBIEL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby

DENIED in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

A True Copy:

Teste:

/s/ Thomas F. Strubbe, Chief Deputy
Clerk of the United States Court of Appeals
for the Seventh Circuit

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570 April 3, 1968

Kenneth J. Carrick, Esquire
Clerk, United States Court of
Appeals for the Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

Re: No. 14698, Russell Scofield,
Lawrence Hansen, Emil Stefanec,
George Kozbeil v. N.L.R.B.

Dear Mr. Carrick:

We are enclosing eight mimeographed copies of the Board's proposed decree in the above-entitled matter. After entry of the decree by the Court we would appreciate your returning one certified copy thereof to this office, and sending another certified copy to the Regional Director whose name and address are listed below.

Certificate of service is also enclosed.

Very truly yours,

Marcel Mallet-Prevost
Assistant General Counsel

cc & documents to:

Ross M. Madden, Director
Region 13, N.L.R.B.
881 U. S. Courthouse & F. O. B.
219 South Dearborn Street
Chicago, Illinois 60604

Quarles, Herriott & Clemons
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411 East Mason Street
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Stephen I. Schlossberg
8000 East Jefferson Avenue
Detroit, Michigan 48214

Harold A. Katz
7 South Dearborn Street
Chicago, Illinois 60603

United States Court of Appeals
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Kenneth J. Carrick
Clerk

April 8, 1968

Mr. James Urdan
Attorney at Law
411 East Mason Street
Milwaukee, Wisconsin

Re: Russell Scofield, et al. v. National Labor Relations Board,
No. 14698

Dear Mr. Urdan:

The National Labor Relations Board has submitted a draft of a decree, which they suggest is in conformity with this Court's opinion in the above entitled cause.

Enclosed is the draft decree, which you may approve as to form in writing on the draft and returning it to me for presentation to the Court. If you believe that it is not in conformity with the Court's opinion, you may return the draft to me with an original and four copies of your suggestions in opposition by Tuesday, April 16, 1968.

Very truly yours,

Kenneth J. Carrick, Clerk

KJC: hm
Enc.

United States Court of Appeals
For the Seventh District
219 South Dearborn Street
Chicago, Illinois 60604

Kenneth J. Carrick
Clerk

April 16, 1968

National Labor Relations Board
Washington, D. C.

James Urdan, Esq.
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Harold A. Katz, Esq.
7 So. Dearborn Street
Chicago, Illinois

Philip L. Padden, Esq.
606 W. Wisconsin Avenue
Milwaukee, Wisconsin

Re: Russell Scofield, et al., Petitioners v. National Labor Relations Board, Respondent
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Intervenors

No. 14698

Gentlemen:

Enclosed is certified copy of the final decree entered by this Court on April 16, 1968, in the above entitled cause.

Very truly yours,
Kenneth J. Carrick, Clerk

DECREE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL,
Petitioners.

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

April 16, 1968

No. 14,698

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Intervenors.

Before KNOCH, *Senior Circuit Judge,* and SWYGERT and CUMMINGS, *Circuit Judges.*

THIS CAUSE came on before the Court upon a petition to review and set aside an order of the National Labor Relations Board, dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in Board Case No. 13-CB-1059-1, 13-CB-1059-2, 13-CB-1059-3 and 13-CB-1059-4. The Court heard argument of respective counsel on January 17, 1968, and has considered the briefs and transcript of record filed in this cause. On March 5,

1968, the Court being fully advised in the premises handed down its opinion denying the petition to review. In conformity therewith it is

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that the petition to review an order of the National Labor Relations Board dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in the above matter, be and it hereby is denied.

WIN G. KNOCH
Judge, United States Court of Appeals for the Seventh Circuit

LUTHER M. SWYGERT
Judge, United States Court of Appeals for the Seventh Circuit

WALTER J. CUMMINGS
Judge, United States Court of Appeals for the Seventh Circuit

A True Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

No. 273, October Term, 1968

RUSSELL SCOFIELD, et al.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, et al.

ORDER ALLOWING CERTIORARI. Filed October 14, 1968.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, reserving for decision, after argument, the question of whether the petition for writ of certiorari was timely filed. The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.